

***United States Court of Appeals
for the
District of Columbia Circuit***



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TRANSCRIPT OF RECORD

United States Court of Appeals for the
District of Columbia

JANUARY TERM, 1940.

No. 7568

576

UNITED STATES OF AMERICA, ACTING ON THE
RELATION OF EDMOND C. FLETCHER, AND
THE SAID EDMOND C. FLETCHER, INDIVIDU-
ALLY, APPELLANT,

vs.

JOHN H. FAHEY ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR
THE DISTRICT OF COLUMBIA.

FILED JANUARY 9, 1940

PRINTED MARCH 11, 1940

United States Court of Appeals for the District of Columbia

JANUARY TERM, 1940.

No. 7568

UNITED STATES OF AMERICA, ACTING ON THE
RELATION OF EDMOND C. FLETCHER, AND
THE SAID EDMOND C. FLETCHER, INDIVIDU-
ALLY, APPELLANT,

VS.

JOHN H. FAHEY, THOMAS D. WEBB, FRED W. CAT-
LETT, WILLIAM F. STEPHENSON, PATRICK J.
MALONEY, AND ROBERT L. NAGLE, APPEL-
LEES.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR
THE DISTRICT OF COLUMBIA.

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United States Court of Appeals for the District of Columbia

A. District Court of the United States
For the District of Columbia

Civil Action, No. 969.

UNITED STATES OF AMERICA, acting on the relation of EDMOND C. FLETCHER, and the said EDMOND C. FLETCHER, individually, *Plaintiff*,

VS.

JOHN H. FAHEY, THOMAS D. WEBB, FRED W. CATLETT, WILLIAM F. STEPHENSON, PATRICK J. MALONEY, ROBERT L. NAGEL, WALTER H. NEWTON, A. E. HUTCHINSON, and HORACE RUSSELL, *Defendants*.

UNITED STATES OF AMERICA,
District of Columbia, ss:

BE IT REMEMBERED, that in the District Court of the United States for the District of Columbia, at the City of Washington, in said District, at the times hereinafter mentioned, the following papers were filed and proceedings had, in the above-entitled cause, to wit:

1 Filed May 18 1939

District Court of the United States
For the District of Columbia.

Civil Action, No. 969.

UNITED STATES OF AMERICA, acting on the relation of EDMOND C. FLETCHER, and the said EDMOND C. FLETCHER, individually (48 Independence Ave., S. W., Washington, D. C.), *Plaintiff*,

vs.

JOHN H. FAHEY (101 Indiana Avenue, N. W., Washington, D. C.), THOMAS D. WEBB (101 Indiana Avenue, N. W., Washington, D. C.), FRED W. CATLETT (101 Indiana Avenue, N. W., Washington, D. C.), WILLIAM F. STEPHENSON (1629 Columbia Road, N. W., Washington, D. C.), PATRICK J. MALONEY (101 Indiana Avenue, N. W., Washington, D. C.), ROBERT L. NAGLE (101 Indiana Avenue, N. W., Washington, D. C.), WALTER H. NEWTON (3131 E. Calhoun Rd., Minneapolis, Minn.), A. E. HUTCHINSON, (114 Marietta Street, Atlanta, Ga.), and HORACE RUSSELL (333 N. Mich. Blvd., Chicago, Ill.), *Defendants*.

Amended Complaint.

(For recovery of money obtained from United States, and forfeiture and damages).

Comes now the plaintiff, United States of America, acting on the relation of Edmond C. Fletcher, and the said Edmond C. Fletcher, individually, upon leave of the Court first had, and files this amended complaint herein, and for cause of action respectfully alleges:

1. This action arises under and by virtue of Sections 231, 232, 234, and 235, Title 31, of the United States Code (1934 Ed.).

2. The plaintiff, United States of America, prosecutes this action upon the relation of Edmond C. Fletcher, and the said Edmond C. Fletcher, individually.

3. The defendants, John H. Fahey, Thomas D. Webb, Fred W. Catlett, William F. Stephenson, Patrick J. Maloney, Robert L. Nagle, Walter H. Newton, A. E. Hutch-

inson, and Horace Russell, at all times hereinafter mentioned, were not in the military or naval forces, or in the militia, of the United States of America.

2 4. The Congress of the United States by its Act, approved June 13, 1933, enacted what is known as the "Home Owners' Loan Act of 1933" (48 Stat. 128 et seq., chapter 64), the material provisions of which are as follows:

"Definition

Sec. 2. As used in this Act—

(a) The term 'Board' means the Federal Home Loan Bank Board created under the Federal Home Loan Bank Act.

(b) The term 'Corporation' means the Home Owners' Loan Corporation created under section 4 of this Act.

*

*

*

Creation of Home Owners' Loan Corporation

Sec. 4. (a) The Board is hereby authorized and directed to create a corporation to be known as the Home Owners' Loan Corporation, which shall be an instrumentality of the United States, which shall have authority to sue and be sued in any court of competent jurisdiction, Federal or State, and which shall be under the direction of the Board and operated by it under such bylaws, rules, and regulations as it may prescribe for the accomplishment of the purposes and intent of this section. The members of the Board shall constitute the board of directors of the Corporation and shall serve as such directors without additional compensation.

(b) The Board shall determine the minimum amount of the capital stock of the Corporation and is authorized to increase such capital stock from time to time in such amounts as may be necessary, but not to exceed in the aggregate \$200,000,000. Such stock shall be subscribed for by the Secretary of the Treasury on behalf of the United States, and payments of such subscriptions shall be subject to call in whole or in part by the Board and shall be made at such time or times as the Secretary of the Treasury deems advisable. The Corporation shall issue to the Secretary of the Treasury receipts for payments by him for

or on account of such stock, and such receipts shall be evidence of the stock ownership of the United States.”

5. On June 13, 1933, the date of the approval of the Act, supra, and at all times hereinafter mentioned, the Federal Home Loan Bank Board, the donee of the power conferred by said Act, consisted of five members. On June 13, 1933, and until April 5, 1934, such members consisted of John H. Fahey, Thomas D. Webb, Russell Hawkins, William F. Stephenson, and Walter H. Newton, all of whom, excepting Russell Hawkins, since deceased, are made defendants in this action. On April 5, 1934, the defendant, Fred W. Catlett, became a member of said Board, vice said Russell Hawkins. On June 13, 1933, and at all times hereinafter mentioned, the defendants, John H. Fahey, Thomas D. Webb, and William F. Stephenson, were members of said Board, with the defendant Patrick J. Maloney, as Treasurer, and the defendant Horace Russell, as General Counsel. On June 13, 1933, and until February 16, 1934,
3 the defendant, A. E. Hutchinson, was the Secretary of said Board. On February 16, 1934, and at all times hereinafter mentioned, the defendant, Robert L. Nagle, was the Secretary thereof.

6. One June 14, 1933, the defendants, John H. Fahey, Thomas D. Webb, William F. Stephenson, Walter H. Newton, Patrick J. Maloney, A. E. Hutchinson, and Horace Russell, together with Russell Hawkins, acting in the name of the said Federal Home Loan Bank Board, at a meeting called in the City of Washington, in the District of Columbia, misconceiving themselves to be a Sovereign power, from which all corporate franchises flow, spread upon the records of said Board, without authority of law, an undated and unsigned paper-writing, which was conceived by the defendant Horace Russell, and which is in words and figures following:

“Charter

Know All Men by These Presents:

1. That Whereas, the Home Owners’ Loan Act of 1933, directs the Federal Home Loan Bank Board to create the Home Owners’ Loan Corporation,

Therefore:

2. Pursuant to said Act there is hereby created a corporation under the laws of the United States to be known as the

Home Owners' Loan Corporation

3. The home office of said Corporation shall be in Washington, District of Columbia, but it shall have power to establish such other offices or agencies as to it may be or appear to be necessary or appropriate.

4. The capital of said corporation shall be \$200,000,000, which shall be subscribed by the Secretary of the Treasury on behalf of the United States and called for by the Board as required.

5. The Corporation is authorized to issue bonds in an aggregate amount not to exceed \$2,000,000,000 upon the terms and conditions specified in said Act.

6. Said Corporation shall have full power to do all of the things it is authorized to do in said Act and full power to do all of the things incident to, necessary, or proper, in the exercise of its functions.

7. Said Corporation shall have power to sue and shall be subject to suit as other corporations and shall have the usual powers and immunities of corporations of the United States.

8. This Charter, by a copy thereof duly certified to be true by the Secretary of the Federal Home Loan Bank Board under the Seal of said Board shall be accepted as evidence of said Corporation.

June , 1933,

By
Secretary."

4 Plaintiff avers that the aforesaid paper-writing, called a "charter", is a nullity and void on its face, in that the Home Owners' Loan Act of 1933, to which it refers, failed to authorize or direct said Federal Home Loan Bank Board to make, issue, or create a charter to or for the Home Owners' Loan Corporation, of which fact the defendants then and there well knew.

7. On June 15, 1933, the defendants John H. Fahey, Thomas D. Webb, William F. Stephenson, Walter H. Newton, Patrick J. Maloney, A. E. Hutchinson, and Horace Russell, acting in the name of said Federal Home Loan

Bank Board, and well knowing that said Board had failed to procure from any Sovereign power, Federal or State, a corporate charter for and in the name of the Home Owners' Loan Corporation, nor taken any steps in that behalf, as required by the general incorporation laws of the several States of the Union and the District of Columbia, and well knowing of the non-existence of such Home Owners' Loan Corporation, as a body corporate or politic, and its consequent lack of legal capacity to receive money or other property from the United States, nevertheless, and for the purpose of obtaining or aiding to obtain the payment or approval, by the Secretary of the Treasury of the United States, of a claim upon or against the Government of the United States, in the aggregate amount of \$200,000,000, as more particularly set forth in paragraphs 9 to 21, inclusive, in this amended complaint, they, the said defendants, in the City of Washington, District of Columbia, by a letter dated June 15, 1933, signed by the said Federal Home Loan Bank Board, by A. E. Hutchinson, Secretary, addressed and transmitted to the said Secretary of the Treasury of the United States, together with a copy of a purported resolution adopted by said pretended Home Owners' Loan Corporation, did together represent to the said Secretary of the Treasury that the Home Owners' Loan Corporation was a bona fide and existing body corporate, with a capital stock of \$200,000,000, divided into 2,000,000 shares, each having a par value of \$100; and, by said letter, did together make a call upon said Secretary of the Treasury to subscribe, on behalf of the United States, for all of such purported capital stock of said pretended corporation, in the aggregate amount of \$200,000,000, and to make payment therefor out of the Treasury of the United States; and, by said letter, did together make a claim or call upon said Secretary of the Treasury to pay or cause to be paid, out of the Treasury of the United States, the immediate sum of \$1,000,000 to said defendants, as

5 the agents of such pretended corporation, as part payment for such purported capital stock as aforesaid; and, by said resolution, did together represent to said Secretary of the Treasury that bona fide receipts for such sum or sums of money, when received from the United States, could and would be executed by the Treasurer and

Secretary, jointly, of and for said pretended corporation.

Plaintiff avers that the aforesaid representations, claims, and calls, each and all, were false, fictitious, and fraudulent upon the Government of the United States, as the defendants then and there well knew.

8. On June 19, 1933, Dean Atcheson, Acting Secretary of the Treasury of the United States, without having in his hand or control a charter, or copy of a charter, of said pretended Home Owners' Loan Corporation, by his letter dated June 19, 1933, to said Federal Home Loan Bank Board, subscribed for all of the purported capital stock of said non-existing Home Owners' Loan Corporation, as a body corporate, on behalf of the United States, at and for the price of \$200,000,000. And thereafter and in the month of June, 1933, said Acting Secretary of the Treasury, in response to the claim or call made by said Board, as aforesaid, for the immediate payment of \$1,000,000 as part payment for such purported stock in said pretended corporation, as aforesaid, caused said sum of \$1,000,000 to be placed to the credit account, known as the Home Owners' Loan Corporation Account, No. 390,980, in the Treasury of the United States. Thereafter and before September 10, 1933, said sum of money was paid of the Treasury of the United States to the said defendants, acting in the name of said pretended corporation, or to others as they directed.

And which said claim or call was false, fictitious, and fraudulent, as the defendants then and there well knew.

10. Thereafter and in the month of September, 1933, said defendants, acting in the name of said Federal Home Loan Bank Board, and for the purpose of obtaining or aiding to obtain the payment or approval, by the Secretary of the Treasury, of a claim upon or against the Government of the United States, by letter made another claim or call upon said Secretary of the Treasury for an additional sum of \$1,000,000, as part payment for such purported capital stock in said pretended corporation. Whereupon the said

6 Acting Secretary of the Treasury, in said month, caused said sum of \$1,000,000 to be placed to the credit account, known as the Home Owners' Loan Corporation Account, No. 390,980, in the Treasury of the United States. Thereafter and before October 10, 1933, said sum was paid out of the Treasury of the United States

to the said defendants, acting in the name of said pretended corporation, or to others as they directed.

And which said claim or call was false, fictitious, and fraudulent, as the defendants then and there well knew.

11. Thereafter and in the month of October, 1933, said defendants, acting in the name of said Board, and for the purpose of obtaining or aiding to obtain the payment or approval, by the said Secretary of the Treasury, of a claim upon or against the Government of the United States, by letter made another claim or call upon said Secretary of the Treasury for another sum of \$2,000,000, as part payment for such pretended capital stock as aforesaid. Whereupon the said Acting Secretary of the Treasury, in said month, caused said sum of \$2,000,000 to be placed to the credit account, No. 390,980, as aforesaid, of said pretended corporation. Thereafter and before November 11, 1933, said sum was paid out of the Treasury of the United States to said defendants, acting in the name of said pretended Home Owners' Loan Corporation, or to others as they directed.

And which said claim or call was false, fictitious, and fraudulent, as the defendants then and there well knew.

12. Thereafter and in the month of November, 1933, said defendants, acting in the name of said Board, and for the purpose of obtaining or aiding to obtain the payment or approval, by the said Secretary of the Treasury, of a claim upon or against the Government of the United States, by letter made another claim or call upon said Secretary of the Treasury for an additional sum of \$10,000,000, as part payment for such purported capital stock in said pretended corporation. Whereupon said Acting Secretary of the Treasury in said month caused said sum of \$10,000,000 to be placed to the credit account, known as the Home Owners' Loan Corporation Account, No. 390,980, of said pretended corporation. Thereafter and before December 10, 1933, said sum was paid out of the Treasury of the United States to said defendants, acting in the name of said pretended corporation, or to others as they directed.

And which said claim or call was false, fictitious, and fraudulent, as the defendants then and there well knew.

13. Thereafter and in the month of December,
7 1933, said defendants acting in the name of said

Board, and for the purpose of obtaining or aiding to obtain the payment or approval, by said Secretary of the Treasury, of a claim upon or against the Government of the United States, by letter made another claim or call upon him for an additional sum of \$5,000,000, as part payment for such purported stock in said pretended corporation. Whereupon said Acting Secretary of the Treasury, in said month, caused said sum of \$5,000,000 to be placed to the credit account, No. 390,980, of said pretended corporation. Thereafter and before January 10, 1934, said sum was paid out of the Treasury of the United States to said defendants, acting in the name of said alleged corporation, or to others as they directed.

And which said claim or call was false, fictitious, and fraudulent, as the defendants then and there well knew.

14. Thereafter and in the month of January, 1934, said defendants, acting in the name of said Board, and for the purpose of obtaining or aiding to obtain the payment or approval, by the Secretary of the Treasury, of a claim upon or against the Government of the United States, by letter made another claim or call upon him for an additional sum of \$5,000,000, as part payment for such purported stock in said pretended corporation. Whereupon said Acting Secretary of the Treasury, in said month, caused said sum of \$5,000,000 to be placed to the credit account, No. 390,980, of said pretended corporation. Thereafter and before February 10, 1934, said sum was paid out of the Treasury of the United States to said defendants, acting in the name of said pretended corporation, or to others as they directed.

And which said claim or call was false, fictitious, and fraudulent, as the defendants then and there well knew.

15. Thereafter and in the month of February, 1934, said defendants, acting in the name of said Board, and for the purpose of obtaining or aiding to obtain the payment or approval, by the Secretary of the Treasury, of a claim upon or against the Government of the United States, by letter made another claim or call upon him for an additional sum of \$10,000,000, as part payment for such purported stock in said pretended corporation. Whereupon Henry Morgenthau, Jr., Secretary of the Treasury, in said month, caused said sum of \$10,000,000 to be placed to the credit account, No. 390,980, of said pretended corporation. Thereafter

and before March 10, 1934, said sum was paid out of the Treasury of the United States to said defendants, acting in the name of said pretended corporation, or to others as they directed.

And which said claim or call was false, fictitious, and fraudulent, as the defendants then and there well knew.

16. Thereafter and in the month of March, 1934, said defendants, acting in the name of said Board, and for the purpose of obtaining or aiding to obtain the payment or approval, by the said Secretary of the Treasury, of a claim upon or against the Government of the United States, by letter made another claim or call him for an additional sum of \$20,000,000, as part payment for such purported stock in said pretended corporation. Whereupon said Secretary of the Treasury, in said month, caused said sum of \$20,000,000 to be placed to the credit account, No. 390,980, of said pretended corporation. Thereafter and before April 10, 1934, said sum was paid out of the Treasury of the United States to said defendants, acting in the name of said pretended corporation, or to others as they directed.

And which said claim or call was false, fictitious, and fraudulent, as the defendants then and there well knew.

17. Thereafter and in the month of April, 1934, the defendants, Fahey, Webb, Stephenson, Fred W. Catlett, Newton, Maloney, Robert L. Nagle, and Russell, acting in the name of said Board, and for the purpose of obtaining or aiding to obtain the payment or approval, by the Secretary of the Treasury, of a claim upon or against the Government of the United States, by letter made another claim or call upon him for an additional sum of \$10,000,000, as part payment for such purported stock in said pretended corporation. Whereupon said Secretary of the Treasury, in said month, caused said sum of \$10,000,000 to be placed to the credit account, No. 390,980, of said pretended corporation. Thereafter and before May 10, 1934, said sum was paid out of the Treasury of the United States to said defendants, acting in the name of said pretended corporation, or to others as they directed.

And which said claim or call was false, fictitious, and fraudulent, as the defendants then and there well knew.

18. Thereafter and in the month of May, 1934, said defendants, Fahey, Webb, Stephenson, Catlett, Newton, Ma-

loney, Nagle, and Russell, acting in the name of said Board, and for the purpose of obtaining or aiding to obtain the payment or approval, by the said Secretary of the Treasury, of a claim upon or against the Government of the

United States, by letter made another claim or call
9 upon him for an additional sum of \$45,000,000, as part payment for such purported stock in said pretended corporation. Whereupon said Secretary of the Treasury, in said month, caused said sum of \$45,000,000 to be placed to the credit account, No. 390,980, of said pretended corporation. Thereafter and before June 10, 1934, said sum was paid out of the Treasury of the United States to said defendants, acting in the name of said pretended corporation, or to others as they directed.

And which said claim or call was false, fictitious, and fraudulent, as the defendants then and there well knew.

19. Thereafter and in the month of June, 1934, said defendants, Fahey, Webb, Stephenson, Catlett, Newton, Maloney, Nagle, and Russell, acting in the name of said Board, and for the purpose of obtaining or aiding to obtain the payment or approval, by the Secretary of the Treasury, of a claim upon or against the Government of the United States, by letter made another claim or call upon him for an additional sum of \$45,000,000, as part payment for such purported stock in said pretended corporation. Whereupon said Secretary of the Treasury, in said month, caused said sum of \$45,000,000 to be placed to the credit account, No. 390,980, of said pretended corporation. Thereafter and before July 10, 1934, said sum was paid out of the Treasury of the United States to said defendants, acting in the name of said pretended corporation, or to others as they directed.

And which said claim or call was false, fictitious, and fraudulent, as the defendants then and there well knew.

20. Thereafter and in the month of July, 1934, the defendants, Fahey, Webb, Stephenson, Catlett, Newton, Maloney, Nagle, and Russell, acting in the name of said Board, and for the purpose of obtaining or aiding to obtain the payment or approval, by the Secretary of the Treasury, of a claim upon or against the Government of the United States, by letter made another claim or call upon him for an additional sum of \$20,000,000, as part payment for such pur-

ported stock in said pretended corporation. Whereupon said Secretary, in said month, caused the sum of \$20,000,000 to be placed to the credit account, No. 390,980, of said pretended corporation. Thereafter and before August 10, 1934, said sum was paid out of the Treasury of the United

States to said defendants, acting in the name of said pretended corporation, or to others as they directed.

And which said claim or call was false, fictitious, and fraudulent, as the defendants then and there well knew.

21. Thereafter and in the month of August, 1934, said defendants, Fahey, Webb, Stephenson, Catlett, Maloney, Nagle, and Russell, acting in the name of said Board, and for the purpose of obtaining or aiding to obtain the payment or approval, by the Secretary of the Treasury of the United States, of a claim upon or against the Government of the United States, by letter made another claim or call upon him for an additional sum of \$26,000,000, as final payment for such purported stock in said pretended corporation. Whereupon said Secretary of the Treasury, in said month, caused said sum of \$26,000,000 to be placed to the credit account, No. 390,980, of said pretended corporation. Thereafter and before December 10, 1934, said sum was paid out of the Treasury of the United States to said defendants, acting in the name of said pretended Home Owners' Loan Corporation, or to others as they directed.

And which said claim or call was false, fictitious, and fraudulent, as the defendants then and there well knew.

22. The acts of the said defendants hereinbefore set forth and described, in obtaining or aiding to obtain the payment or approval, by the Secretary of the Treasury, of the several claims upon or against the Government of the United States, and in obtaining the sum of \$200,000,000, out of the Treasury of the United States, upon the aforesaid false, fictitious, and fraudulent claims, and then and there known by the defendants to be false, fictitious, and fraudulent, has caused a loss and damage to the Government of the United States in the aggregate sum of \$200,000,000.

23. This action is brought under and by virtue of Sections 231, 232, 234, and 235, Title 31, of the United States Code (1934 Ed.), and by reason thereof the defendants are liable to the United States in double the sum of \$200,000,-

000, or, to wit, \$400,000,000, and \$2,000, as a penalty for each false, fictitious, and fraudulent claim, seventeen in number, to wit, \$34,000, or a total sum of \$400,034,000.00.

WHEREFORE, the United States of America, acting on the relation of Edmond C. Fletcher, and the said Edmond C. Fletcher, individually, plaintiff, prays judgment
11 against the defendants for the sum of \$400,000,000.00, as damages, and for the sum of \$34,000.00, as penalties and forfeitures, besides the costs of this action.

EDMOND C. FLETCHER, *Pro se*,
Plaintiff.

DISTRICT OF COLUMBIA, ss:

Edmond C. Fletcher, first being duly sworn on oath, deposes and says that he is the plaintiff named in the foregoing amended complaint, made and filed for and on behalf of the United States of America, on his own relation, and on his own behalf, as an individual; that he has read the foregoing complaint and knows the contents thereof, and that the allegations of matters of fact therein set forth are true, and those made on information and belief he believes to be true.

EDMOND C. FLETCHER

Subscribed and sworn to before me this 16th day of May, 1939.

(Notarial Seal) J. CRAWFORD SHANKS,
Notary Public, D. C.

My commission expires Nov. 30, 1943.

12 *Marshall's Return on Summons Issued*
December 10, 1938

1	John H. Fahey	} Service accepted by Robert L. Nagle December 12, 1938.
2	Thomas D. Webb	
3	Fred W. Catlett	
4	William F. Stevenson	Personally Dec 19 1938
5	Patrick J. Maloney	Personally Dec 12 1938
6	Robert L. Nagle	Personally Dec 12 1938

13 *Motion to Dismiss Amended Complaint.*

Filed May 27 1939

* * *

The defendants, John H. Fahey, Thomas D. Webb, Fred W. Catlett, William F. Stevenson, Patrick J. Maloney and Robert L. Nagle, move to dismiss the amended complaint filed herein on the following grounds:

1. The amended complaint fails to state a claim against said defendants upon which relief can be granted.

HAROLD LEE
LUKE E. KEELEY
N

HARVEY D JACOB
E. K. NEUMANN

Attorneys for Defendants.

14 *Reply of Plaintiff to Motion of Defendants to Dismiss Amended Complaint.*

Filed June 2-1939

* * *

Comes now the plaintiff, pro se, opposing the motion of the defendants to dismiss the amended complaint, filed herein on May 18, 1939, and tenders a statement of the points and authorities relied on.

Among the matters of law to be argued in support of the foregoing opposition are the following:

1. The amended complaint states a claim against the defendants upon which relief can be granted.

2. This suit or action against the defendants, having been brought under the provisions of Sections 231, 232, 234, and 235, Title 31, United States Code (1934 ed.), cannot be dismissed or discontinued except in the manner provided by such statute, Section 232.

EDMOND C. FLETCHER, *Pro se,*
Plaintiff.

15

Memorandum Opinion.

Filed October 31 1939

* * *

The amended complaint in the above entitled cause is dismissed on the authority of *Fletcher v. Jones, et al.*, 105 Federal 2nd 58, where the creation and legal existence of the Home Owners Loan Corporation is fully recognized.

T. ALAN GOLDSBOROUGH
Justice

16

Order Sustaining Motion to Dismiss the Amended Complaint.

Filed November 9-1939

* * *

Upon consideration of the motion of the defendants, John H. Fahey, Thomas D. Webb, Fred W. Catlett, William F. Stevenson, Patrick J. Maloney and Robert L. Nagle to dismiss the amended complaint filed in this case on May 18, 1939, it is, this 7th day of November, 1939, by the Court,—

ORDERED, that said motion be and the same hereby is sustained, and that the said amended bill be and the same hereby is dismissed as to each and all of said defendants.

T. ALAN GOLDSBOROUGH
Justice.

No objection

E. C. FLETCHER.

17

Notice of Appeal.

Filed December 1 1939

* * *

Notice is hereby given this 1st day of December, 1939, that the plaintiff, United States of America, acting on the relation of Edmond C. Fletcher, and the said Edmond C. Fletcher, individually, hereby appeals to the United States Court of Appeals for the District of Columbia from the judgment of this Court entered on the 7th day of November, 1939, in favor of the defendants, John H. Fahey, Thomas D. Webb, Fred W. Catlett, William F. Stephenson,

Patrick J. Maloney, and Robert L. Nagle, against said plaintiff.

United States of America, acting on the relation of Edmond C. Fletcher, and the said Edmond C. Fletcher, individually,

EDMOND C FLETCHER, *Pro se*,
Plaintiff.

18 *Assignment of Errors.*

Filed December 4 1939

* * *

Now comes the plaintiff herein and files the following assignment of errors upon which it will rely in the prosecution of its appeal from the judgment in this cause, entered by the Court on the 7th day of November, 1939.

1. The District Court of the United States for the District of Columbia erred in sustaining the joint motion of the defendants, John H. Fahey, Thomas D. Webb, Fred W. Catlett, William F. Stephenson, Patrick J. Maloney, and Robert L. Nagle, to dismiss the amended complaint of the plaintiff.

2. Said District Court erred in entering judgment in favor of said defendants, dismissing the plaintiff's amended complaint herein.

United States of America, acting on the relation of Edmond C. Fletcher, and the said Edmond C. Fletcher, individually,

By: EDMOND C. FLETCHER, *Pro se*,
Plaintiff.

19 *Order Reducing Penalty of Appeal Bond.*

Filed December 21 1939

* * *

This cause came on to be heard on the motion of the plaintiff for an order reducing the statutory amount of the bond on appeal from \$250.00 to the penal sum of \$100.00, or \$50.00 in cash, in lieu thereof, and thereupon and upon consideration thereof, it is this 21 day of December, 1939,

ORDERED that the motion be, and it is hereby, granted; and it is further

Ordered that the bond for costs on said appeal to the United States Court of Appeals for the District of Columbia be, and the same is hereby, set at One Hundred Dollars (\$100.00), or Fifty Dollars (\$50.00) cash, in lieu thereof.

By the Court:

JAMES M PROCTOR,
Justice.

No objection:

HARVEY D. JACOB,
Attorney for Defendants.

Memorandum

JANUARY 3, 1940

Cost bond (\$100.00) on appeal filed.

20

Designation of Record.

Filed December 4 1939

* * *

To the Clerk:

For the purposes of appeal herein, taken December 1, 1939, you will please prepare and include in the transcript of the record on appeal the following:

1. Amended complaint.
2. Memorandum of Marshal's return of service of process on defendants, first six named in original complaint.
3. Defendants' joint motion to dismiss amended complaint.
4. Opposition of plaintiff to dismiss amended complaint.
5. Court's opinion on motion to dismiss amended complaint.
6. Judgment dated November 7, 1939.
7. Minute entry as to notice of appeal, filed December 1, 1939.
8. Assignment of errors.
9. This designation.
10. Clerk's certificate.

United States of America, acting on the relation of Edmond C. Fletcher, and the said Edmond C. Fletcher, individually,

By EDMOND C. FLETCHER, *Pro se*,
Plaintiff.

Service of a copy of the above is hereby acknowledged this 4th day of December, 1939.

HARVEY D. JACOB,
Attorney for defendants.

21 District Court of the United States for the
District of Columbia

UNITED STATES OF AMERICA,
District of Columbia, ss:

I, Charles E. Stewart, Clerk of the District Court of the United States for the District of Columbia, hereby certify the foregoing pages numbered from 1 to 20, both inclusive, to be a true and correct transcript of the record, according to directions of counsel herein filed, copy of which is made part of this transcript, in cause No. 969, Civil Action, wherein United States of America, acting on the relation of Edmond C. Fletcher, and the said Edmond C. Fletcher, individually, is Plaintiff and John H. Fahey, et al., are Defendants, as the same remains upon the files and of record in said Court.

IN TESTIMONY WHEREOF, I hereunto subscribe my name and affix the seal of said Court, at the City of Washington, in said District, this 6th day of January, 1940.

(Seal) CHARLES E STEWART,
Clerk.

By C B COFLIN,
Asst. Clerk.

Endorsed on Cover: No. 7568. United States of America acting on the Relation of Edmond C. Fletcher, and the said Edmond C. Fletcher, Individually, Appellant, vs. John H. Fahey, et al. United States Court of Appeals for the District of Columbia Filed Jan 9-1940 Joseph W. Stewart, Clerk.

FILED AUG 30 1940

IN THE
United States Court of Appeals for the
District of Columbia

No. 7568.

UNITED STATES OF AMERICA, acting on the rela-
tion of EDMOND C. FLETCHER, and the said
EDMOND C. FLETCHER, individually,
APPELLANT,

vs.

JOHN H. FAHEY, *et al.*,
APPELLEES.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES
FOR THE DISTRICT OF COLUMBIA.

BRIEF FOR APPELLANT.

EDMOND C. FLETCHER, *Pro se*,
Appellant.

103 C Street, S. E.,
Washington, D. C.

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APPELLEES.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES
FOR THE DISTRICT OF COLUMBIA.

BRIEF FOR APPELLANT.

Jurisdictional Statement.

This is an appeal from a judgment of the District Court of the United States for the District of Columbia, sustaining the joint motion of the defendants, six in number, now the appellees, to dismiss the amended complaint of the plaintiff, now the appellant, and in entering judgment dismissing said complaint. The appellant, by its amended complaint filed May 18,

1939, sought to recover the sum of \$400,000,000.00 from the appellees, or double the amount of damages sustained by the United States by reason of money fraudulently and unlawfully obtained by them from the United States Treasury, in the District of Columbia, between June 13, 1933, and December 11, 1934, and for the sum of \$34,000.00, as forfeitures (R. 2-13). The jurisdiction of said Court over the subject-matter and the parties is found in Sections 231, 232, 234, and 235, title 31, of the United States Code (1934 Ed.). The jurisdiction of this Court to review, on appeal, the judgment appealed from in this cause, is found in Section 26, c. 2, title 18, of the Code of the District of Columbia.

Statement of the Case.

The amended complaint, the sufficiency of which is raised by appellees' motion to dismiss, shows, among other things, the following:

On June 13, 1933, the Congress enacted what is known as the "Home Owners' Loan Act of 1933" (48 Stat. 128 *et seq.*), the material provisions of which are set out in the amended complaint (R. 3-4). This Act, among other things, authorized and directed the Federal Home Loan Bank Board to *create* a corporation to be known as the Home Owners' Loan Corporation, with a capital stock of not exceeding the sum of \$200,000,000, to be subscribed and paid for by the Secretary of the Treasury on behalf of the United States (R. 3-4). Thereafter and on June 14, 1933, said Federal Home Loan Bank Board, which was composed of the appellees, in the City of Washington, District of

Columbia, adopted and spread upon its records an undated and unsigned paper-writing called a "Charter", conceived and drafted by its general counsel, Horace Russell, as a charter for the Home Owners' Loan Corporation, with a capital stock of \$200,000,000. This paper-writing is set out and pleaded in *haec verba* in said complaint (R. 4-5).

On June 15, 1933, said appellees, acting in the name of said Federal Home Loan Bank Board, in the City of Washington, District of Columbia, well knowing that said Board had failed to procure from a Sovereign power, Federal or State, a corporate charter for and in the name of Home Owners' Loan Corporation, nor taken any steps in that behalf, addressed and delivered a letter to the Secretary of the Treasury of the United States, together with a copy of a purported resolution of said alleged Home Owners' Loan Corporation, whereby they together did represent to said Secretary of the Treasury that such a corporation was a *bona fide* and existing corporation, with a capital stock of \$200,000,000, divided into 2,000,000 shares, each having a par value of \$100; and, by said letter, did together make a call upon said Secretary of the Treasury to subscribe, on behalf of the United States, for all of the purported capital stock of such pretended corporation, and to make payment therefor out of the Public Treasury, in the aggregate sum of \$200,000,000; and, by said letter, did together make a claim or call upon said Secretary of the Treasury for payment of the immediate sum of \$1,000,000 to said appellees, as the agents of said pretended Home Owners' Loan Corporation, as part payment for such purported capital stock as aforesaid; and, by said resolution, did to-

gether represent to said Secretary of the Treasury that, upon receipt of said sums of money as aforesaid, *bona fide* receipts therefor could and would be executed by the Treasurer and Secretary, jointly, of said pretended Home Owners' Loan Corporation (R. 6-7).

Said amended complaint further shows that the Secretary of the Treasury, by letter dated June 19, 1933, to said Federal Home Loan Bank Board, subscribed for all of said purported capital stock, as aforesaid, on behalf of the United States, at and for the price of \$200,000,000 (R. 7) and thereafter said Secretary of the Treasury paid, or caused to be paid, out of the Treasury of the United States, said sum of \$1,000,000.00 to said appellees, acting in the name of said pretended Home Owners' Loan Corporation (R. 7). Thereafter and in the months of September, October, November, and December, 1933, said Federal Home Loan Bank Board, acting through the appellees made other calls or claims upon said Secretary of the Treasury to make further payments of money for said purported capital stock, and such payments were actually made out of the Treasury of the United States, in the aggregate sum of \$18,000,000.00 to said appellees, acting in the name of said pretended corporation (R. 7-8). In the months of January, February, March, April, May, June, July, and August, 1934, said appellees, acting in the name of said Federal Home Loan Bank Board, made other calls or claims upon said Secretary of the Treasury for the payments of more money for such purported capital stock of said pretended corporation, in the aggregate sum of \$182,000,000.00, and such aggregate sum of money was paid to said appellees, acting in the name of said pretended corpo-

ration, out of the Treasury of the United States, by authority and direction of said Secretary of the Treasury (R. 9-12).

The amended declaration further shows that said appellees, then and there, well knew that said claims or calls and representations were false, fictitious, and fraudulent, and that the several acts so committed by them, in obtaining or aiding to obtain the payment or approval of the several claims upon or against the Government of the United States, and in thereby obtaining said sum of \$200,000,000.00 out of the Treasury of the United States, had caused a loss and damage to the Government of the United States in the aggregate sum of \$200,000,000.00 (R. 12).

On May 27, 1939, the appellees filed a joint motion to dismiss said amended complaint, on the sole ground, to wit, that said amended complaint failed to state a claim against said appellees upon which relief can be granted (R. 14). On June 2, 1939, appellant filed an opposition to the motion to dismiss said amended complaint (R. 14).

On October 31, 1939, the trial Court, after hearing argument, filed in the case a memorandum opinion (R. 15).

On November 9, 1939, the trial Court entered its order and judgment sustaining said motion to dismiss the amended complaint, and dismissing said complaint as to each and all of said appellees-defendants (R. 15), from which the present appeal was duly taken, and afterwards lodged in this Court on January 9, 1940.

Statutes Involved.

The relevant provisions of Sections 231, 232, 234, and 235, title 31, of the United States Code (1934 ed.) are set out in the Appendix.

Specification of Errors Relied Upon.

All of the errors, as assigned in the cause below, are now urged and relied upon in this Court, to wit (R. 16):

1. The District Court of the United States for the District of Columbia erred in sustaining the joint motion of the defendants to dismiss the amended complaint of the plaintiff.

2. Said District Court erred in entering judgment in favor of said defendants, dismissing the plaintiff's amended complaint herein.

Main Questions Presented.

1. Whether the undated and unsigned paper-writing, conceived and drafted by an attorney for the Federal Home Loan Bank Board, and adopted of record by said Board on June 14, 1933 (pleaded in *haec verba* in the amended complaint in this suit), is a valid corporate charter for the Home Owner's Loan Corporation, within the meaning of Section 4 (a) of the Home Owner's Loan Act of 1933, to wit, "The Board is hereby authorized and directed to create a corporation to be known as the Home Owners' Loan Corporation."

2. Whether the amended complaint states a claim against the appellees upon which relief can be granted.

3. Whether said suit, brought under the provisions of Section 232, title 31, United States Code (1934 Ed.) may be lawfully dismissed or discontinued by the trial Court, without first complying with such statute.

ARGUMENT.

I.

The paper-writing, conceived, drafted and adopted of record by the Federal Home Loan Bank Board on June 14, 1933, as a corporate charter for the Home Owners' Loan Corporation, is void on its face.

Reference is now made to the Home Owners' Loan Act of 1933, which, among other things, provides that the "Board (Federal Home Loan Bank Board) is hereby authorized and directed to *create* a corporation to be known as the Home Owners' Loan Corporation." No similar Act, in language, has ever been enacted by the Congress during the past 150 years. Such a paper-writing, as conceived and drafted by an attorney for the Federal Home Loan Bank Board, and adopted of record by said Board on June 14, 1933, as a charter for the Home Owners' Loan Corporation, is wholly without precedent in the history of this country, and, fairly considered, might be deemed as an effort to dispense with the general incorporational laws of the several States of the Union, as well as these of the District of Columbia. In any event, however, such paper-writing, called a "Charter", was not authorized

nor even mentioned in the terms of said Act and is, therefore, a nullity and void on its face. For it happens that this Government is a government of delegated, limited, and enumerated powers. *United States v. Harris*, 106 U. S. 629, 635; *Kansas v. Colorado*, 206 U. S. 46, 87. And, as said by the Supreme Court of the United States, "No man in this country is so high that he is above the law. No officer of the law may set that law at defiance with impunity. All the officers of the government, from the highest to the lowest, are creatures of the law, and are bound to obey it." *United States v. Lee*, 106 U. S. 196. And the general incorporation laws of the several States of the Union and the District of Columbia, are the laws which must be obeyed by the Federal Home Loan Bank Board in order to create a corporation to be known as the Home Owners' Loan Corporation, and ~~as~~ such obedience was contemplated by the Congress in enacting the Home Owners' Loan Act of 1933. For, a corporation is a creature of the law, not of men; its charter or franchise must be granted by a Sovereign power, not by men. The sovereign, within whose territorial domain a number of persons seek the right to operate a certain business as a body corporate, determines the question of whether such right shall be granted. These fundamental principles are but excerpts from the text-books on corporations, plus the many decisions of the Supreme Court of the United States. For instance, in *Home Insurance Co. v. New York*, 134 U. S. 594, it was said:

"The right or privilege to be a corporation, or to do business as such body, is one generally deemed of value to the incorporators, or it would not be sought in such numbers as at present. It is a right or privilege by which several individuals

may unite themselves under a common name, and act as a single person, without dissolution or suspension of business and with a limited liability. *The granting of such right or privilege rests entirely in the discretion of the State."*

In *Ashley v. Ryan*, 153 U. S. 436, 441, it was said:

"That the right to be a state corporation depends solely upon the grace of the State, and is not a right inherent in the parties is settled. * * * A franchise is a right, privilege, or power of public concern, which ought not to be exercised by private individuals at their mere will and pleasure, but should be reserved for public control and administration. * * * Under our system, their existence and disposal are under the control of the legislative department of the government, and cannot be assumed or exercised without legislative authority. * * * *No persons can make themselves a body corporate and politic without legislative authority.* Corporate capacity is a franchise. The list might be continued indefinitely."

It is common knowledge that, in every State of the Union, as well as in the District of Columbia, over which Congress legislates, there are general incorporation laws. All of them prescribe a mode of procedure, conditions, and limitations, to be observed by persons seeking the right to transact business therein under a corporate name and with a limited liability. The amended complaint shows that the appellees, as members of the Federal Home Loan Bank Board on June 14, 1933, disregarded such laws, each and all, and failed to even apply to any Sovereign, Federal or State, for the grant of a charter for and in the name of the Home Owners' Loan Corporation (R. 6). Hence, said corporation is not even a *de facto* corporation. In Har-

rill v. Davis, 168 Fed. (CCA.—8th Cir.) 187, 192, it was said:

“Neither the hope, the belief, nor the statement by parties that they are incorporated, nor the signing of articles of incorporation which are not filed, where filing is requisite to create the corporation, nor the user of the pretended franchise of such non-existent corporation, will constitute such a corporation *de facto* as will exempt those who actively and knowingly use its name to incur obligations from their individual liability to pay them. Color of legal organizations as a corporation under some charter or law and user of the supposed corporate franchise in good faith *are indispensable* to such exemption.”

And further said (p. 193):

“To give a body of men assuming to act as a corporation, where there has been no attempt to comply with the provisions of any law authorizing them to become such, the status of a *de facto* corporation, might open the door to frauds upon the public. It would certainly be impolitic to permit a number of men to have the status of a corporation to any extent merely because there is a law under which they might have incorporated, and they have agreed among themselves to act, and they have acted, as a corporation.”

The foregoing dispel the idea that a body of men, composing the Federal Home Loan Bank Board, had the power and authority, under the terms of the Home Owners' Act of 1933, to grant, issue, or adopt a charter for the Home Owners' Loan Corporation. This Act merely authorized and directed that Board to *create* a corporation, and not a charter. The word “create”, as used in the Act, is well defined in Fletcher on Corporations, sec. 126, as follows:

“Sec. 126. To create in the broad sense is to bring into being, * * *. In the broader sense the creation of a corporation could be taken to include all of the acts and doings from the enactment of the general incorporation law of the legislature through the promotion, underwriting, preparation and execution and filing of the incorporation papers, and obtaining a certificate or charter, to the organization and the first meeting and election of officers which set the corporation in motion full fledged. It has not been usual to give ‘creation’ so broad a scope, and this chapter is restricted to the ‘incorporation’, by which is meant the performance of conditions, acts, deeds, and writings of the incorporators, and the official acts, certifications or records, which give the corporation its existence.”

A somewhat similar Act of Congress, in language, is found in the United States Shipping Board Act of September 7, 1916 (39 Stat. 728 *et seq.*), where in section 11, such Board was authorized to “form” under the laws of the District of Columbia one or more corporations, with a capital stock of \$50,000,000. And said Board, composed of eleven members, filed articles of incorporation, on April 16, 1917, in the office of the Recorder of Deeds of the District of Columbia, secured a charter therefrom, with a capital stock of \$50,000,000, and paid an incorporation fee of \$20,000. In *Sloan Shipyards Corporation v. United States Shipping Board Emergency Fleet Corporation*, 255 U. S. 549, the Supreme Court said:

“The Shipping Act of September 7, 1916, giving the Shipping Board power to form a corporation under the laws of the District of Columbia, contemplated a corporation in which private persons might be stockholders, *and which was to be formed like business corporations.*”

It is thus seen that the Shipping Board, complied with the general incorporation laws of the District of Columbia, by securing from that Sovereign a charter for and in the name of the United States Shipping Board Emergency Fleet Corporation. The word "form" a corporation, as used in that Act, is synonymous with the word "create", as used in the Home Owners' Loan Act of 1933. Yet we see that the Federal Home Loan Bank Board disregarded the general incorporation laws of the several States of the Union, as well as the District of Columbia. And such disregard has been upheld by this Court in *Fletcher v. Jones, et al.*, 105 F. (2d) 58, 70, App. D. C. 179. In this case the complaint, where no pretended charter was pleaded, as in the present complaint, was held insufficient; and this Court declared that the law did not require the Board to procure from any State of the Union, or the District of Columbia, or from the Congress of the United States, any corporate charter for the Home Owners' Loan Corporation. Indeed, one may wonder why statutes are enacted at all in the several States or the District of Columbia, if they are not to be observed by officers of the Government. The Court seems to have misconceived the idea that because the Home Owners' Loan Act of 1933 did not *expressly* direct the Federal Home Loan Bank Board to comply with such incorporation laws, it was unnecessary for said Board to do so, in order to create a corporation to be known as the Home Owners' Loan Corporation. Such doctrine, however, is not the law of this land as announced by the Supreme Court in the cited cases aforesaid. Also, in that case, *supra*, this Court declared that "Congress has at different times adopted various methods for creating federal or governmental corporations," and

then, by footnote (8) said: "Thus, the Federal Prison Industries, Inc., was to be incorporated by *executive order*, pursuant to the provisions of the Act of June 23, 1934, 48 Stat. 1211." Yet, this Act, among other things, reads as follows:

"the President is hereby authorized and empowered, in his discretion, to create a body corporate of the District of Columbia to be known as 'Federal Prison Industries,' which shall be a governmental body."

Hence, there is no mention of an "executive order" in that statute, and this Court was mistaken as to its contents. Moreover, said corporation was actually created by a charter granted by the Recorder of Deeds of the District of Columbia, after articles of incorporation had been filed therefor. The footnote (8) also said: "Under the Act of May 16, 1918, 40 Stat. 550, 551, the President was authorized to create housing corporations." Yet that Act itself declares the following:

"The President, if in his judgment such action is necessary, may *authorize* the creation of a corporation or corporations * * *."

Hence, that Act merely authorized the President to "authorize" the creation of a corporation or corporations. Moreover, the United States Housing Corporation, pursuant to the above Act, was actually granted a charter by the State of New York on July 8, 1918, after articles of incorporation had been filed therefor.

Furthermore, the footnote (8) further declares: "Likewise, under the Act of August 10, 1917, 40 Stat. 276, and the Act of June 16, 1933, 48 Stat. 195, the President was authorized to establish and create cor-

porations in order to effectively carry out the provisions of the respective acts." Yet there is not a single word in said Acts, or either of them, even suggesting the creation of "corporations." This Court, in *Fletcher v. Jones, et al., supra*, further declared: "The method provided by the present Act was that the Federal Home Loan Bank Board should *itself* create the Home Owners' Loan Corporation. This, too, is a method which was commonly used by Congress in the past." Yet the Home Owners' Loan Act of 1933 provides as follows: "The Board is hereby authorized and directed to create a corporation to be known as the Home Owners' Loan Corporation." Hence, this Court supplied the word "itself" to the Act at the proper place, and then proceeded to construe the Act as amended by the Court. Yet, no court can add to or take from the language of a statute. *Stockley v. United States*, 260 U. S. 532, 540. Also, *Fletcher v. Jones, et al., supra*, this Court further said:

"We take judicial notice of the fact that the Federal Home Loan Bank Board *issued a charter* to the Home Owners' Loan Corporation, immediately after the Act was approved in June 1933,
* * *."

Yet the Home Owners' Loan Act of June 13, 1933, failed to authorize said Board to "issue a *charter*" of any character or description whatever and the Court is without power to take judicial notice of a void thing—a thing *which has no legal existence*. On the other hand, this Court may take judicial notice of the provisions of the Act of June 13, 1933, *supra*; if it had done so, it would have seen that such act "*is silent as to the issuance of a charter*". It is also observed that this Court, in *White v. Central Dispensary and*

Emergency Hospital, 69 App. D. C. 122, 126, 99 F. (2d) 355, after citing the various sections of the District Code relating to the incorporation of both business and benevolent corporations, *refused to take judicial notice of a charter of a corporation*. There the Court said:

“Only by taking judicial notice of the appellant’s charter itself could that be determined, *and respectable authority indicates that judicial notice cannot be taken of a charter.*”

And, in quoting from a case in the Supreme Court of Missouri, further said (p. 126):

“We can only know its (the corporation’s) character from the charter granted to it by the State, and we have not been favored with this charter. We do not judicially know the contents of the charters of Missouri corporations. We may know what should be in such charters, when we are advised under what law the corporation is organized.”

Hence, in view of the foregoing authorities, it is seen that the undated and unsigned paper-writing, conceived and adopted by the Federal Home Loan Bank Board on June 14, 1933, as a charter for the Home Owners’ Loan Corporation, is a nullity and void on its face.

II.

The amended complaint states a claim against appellees upon which relief can be granted.

The appellees, by their motion to dismiss the amended complaint, admit all the facts which are well pleaded therein, and their purpose, by such motion, is to test the law arising upon the facts stated in the complaint. *Ball Retainer Co. v. Klahn*, 145 Fed. 834. Said motion

is based upon a single ground, namely, "The amended complaint fails to state a claim against said defendants upon which relief can be granted. This ground requires a discussion as to what is a 'claim' as used in the amended complaint herein." In *Hobbs v. McLain*, 117 U. S. 567, 575, it was said: "What is a claim against the United States is well understood. It is a right to demand money from the United States." In *United States v. Cohn*, 270 U. S. 339, it was said:

"It is clear, in the light of the context, that in the present statute, the provision relating to the payment or approval of a 'claim upon or against' the Government relates solely to the payment or approval of a claim for money or property to which a right is asserted against the Government, based upon the Government's own liability to the claimant."

In *United States v. Mercur Corporation*, 83 F. (2d) 178, involving the same statutes as are involved in the case at bar, the Court said:

"In order to bring a case within the statute we have referred to, it is necessary to show that a claim is presented against the United States, or *in rem* against its property."

And further said (p. 181-182):

"In *Bridgeman v. United States*, 140 Fed. (CCA.-9) 577, a false voucher presented by an Indian agent for payment was properly held within section 5438 because it served as a basis for approval of payment from the treasury funds in the agent's hands."

The amended complaint in the case at bar shows, among other things, that the appellees presented various claims, calls, letters, and representations to the Secretary of the Treasury of the United States, be-

tween June 13, 1933, and December 11, 1934, as a result of which the sum of \$200,000,000 was obtained by them from the Public Treasury of the United States; and that said appellees, then and there, well knew that said claims, calls, and representations were false, fictitious, and fraudulent as against the Government of the United States. The main and most important false representation, so made by appellees, was the letter dated June 15, 1933, advising the Secretary of the Treasury that they had created a corporation, by the name of Home Owners' Loan Corporation, with a capital stock of \$200,000,000 divided into 2,000,000 shares, each having a par value of \$100; and in thereby inducing said Secretary to subscribe for all of such stock and make payment therefor, out of the Public Treasury.

III.

This suit cannot be lawfully dismissed by the Trial Court, except in the mode prescribed by statute under which it was brought.

The present suit, having been brought in the Court below under the provisions of Section 232, title 31, United States Code (1934 Ed.), cannot be lawfully dismissed by that Court, except in the mode prescribed by that statute. Section 232, *supra*, is fully set out in the Appendix hereto. Such statute expressly conferred jurisdiction upon the Court below to hear, try, and determine such suit, and then provided:

“Such suit * * * shall not be withdrawn or discontinued without the consent, in writing, of the judge of the court and the district attorney, first filed in the cause, setting forth their reasons for such consent. (R. S. 3491.)”

The record in the case at bar shows that such statute was not complied with by the trial judge of said Court and the district attorney, the memorandum opinion of the trial Court being as follows (R. 15):

“The amended complaint in the above entitled cause is dismissed on the authority of *Fletcher v. Jones, et al.*, 105 Federal 2nd 58, where the creation and legal existence of the Home Owners’ Loan Corporation is fully recognized.

T. ALAN GOLDSBOROUGH,
Justice.”

The word “dismissed”, as used in the foregoing opinion, is also used in the order of the trial Court dismissing said amended complaint (R. 15). Such word “dismissed” is synonymous with the word “discontinued” in the statute. In 18 Corpus Juris, section 1, the author said:

“A dismissal in effect is equivalent to a nonsuit, and in practice, also imports the same thing as a discontinuance, namely, that the cause is sent out of court.”

To the same effect are the following cases: *English v. Dickey*, 128 Ind. 174; *Aikman v. South*, 29 Ky. L. 1201; *Laenger v. Laenger*, 138 La. 532; *Thurman v. James*, 48 Mo. 235, 236; *Hunsden v. Churchill*, 20 Minn. 408.

From the foregoing, therefore, the trial Court committed a grievous error in disregarding said statute, *supra*, and in dismissing said suit.

Conclusion.

It is respectfully contended that the action of the trial Court, in sustaining the appellees’ motion to dis-

miss said amended complaint, and in entering judgment in their favor dismissing said complaint, should be reversed.

United States of America, acting on the relation of EDMOND C. FLETCHER, and the said EDMOND C. FLETCHER, individually,

By EDMOND C. FLETCHER, *Pro se*,
Appellant.

APPENDIX.

Statute Involved.

The relevant provisions of Sections 231, 232, 234, 235, Title 31, United States Code (1934 ed.) are as follows:

“Sec. 231. *Liability of persons making false claims.* Any person not in the military or naval forces of the United States, or in the militia called into or actually employed in the service of the United States, who shall make or cause to be made, or present or cause to be presented, for payment or approval, to or by any person or officer in the civil, military, or naval service of the United States, any claim upon or against the Government of the United States, or any department or officer thereof, knowing such claim to be false, fictitious, or fraudulent, or who, for the purpose of obtaining or aiding to obtain the payment or approval of such claim, makes, uses, or causes to be made or used, any false bill, receipt, voucher, roll, account, claim, certificate, affidavit, or deposition, knowing the same to contain any fraudulent or fictitious statement or entry, or who enters into any agreement, combination, or conspiracy to defraud the Government of the United States, or any department or officer thereof, by obtaining or aiding to obtain the payment or allowance of any false or fraudulent claim, * * *, shall forfeit and pay to the United States the sum of \$2,000, and, in addition, double the amount of damages which the United States may have sustained by reason of the doing or committing such act, together with the costs of suit; and such forfeiture and damages shall be sued for in the same suit. (R. S., secs. 3490, 5438.)”

“Sec. 232. *Same; suits.* The several district courts of the United States, the supreme court of the District of Columbia, the several district courts of the territories of the United States, within whose jurisdictional limits the persons doing or

committing such act shall be found, shall, where-soever such act may have been done or committed, have full power and jurisdiction to hear, try, and determine such suit. Such suit may be brought and carried on by any person, as well for himself as for the United States; the same shall be at the sole cost and charge of such person, and shall be in the name of the United States, but shall not be withdrawn or discontinued without the consent, in writing, of the judge of the court and the district attorney, first filed in the case, setting forth their reasons for such consent. (R. S. 3491.)”

“Sec. 234. *Rights of persons presenting such suits.* The person bringing said suit and prosecuting it to final judgment shall be entitled to receive one-half of the amount of such forfeiture, as well as one-half of the damages he shall recover and collect; and the other half shall belong to the United States; and such person shall be entitled to receive to his own use all costs the court may award against the defendant, to be allowed and taxed according to any provision of law or rule of court in force, or that shall be in force in suits between private parties in said court; *Provided*, That such person shall be liable in the case, and shall have no claim therefor on the United States. (R. S. 3493.)”

“Sec. 235. *Limitation of suit.* Every such suit shall be commenced within six years, from the commission of the act, and not afterward. (R. S. 3494.)”

IN THE
United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA.

No. 7568.

UNITED STATES OF AMERICA, ACTING ON THE RELATION
OF EDMOND C. FLETCHER, AND THE SAID EDMOND C.
FLETCHER, INDIVIDUALLY, *Appellant*,

v.

JOHN H. FAHEY, ET AL., *Appellees*.

Appeal from the District Court of the United States
for the District of Columbia.

BRIEF FOR APPELLEES.

HAROLD LEE,
E. K. NEUMANN,
NEAL L. THOMPSON,
Attorneys for Appellees.

HARVEY D. JACOB,
Of Counsel.

Attorney of Record

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v.

JOHN H. FAHEY, ET AL., *Appellees*.

Appeal from the District Court of the United States
for the District of Columbia.

BRIEF FOR APPELLEES.

STATEMENT OF THE CASE.

Appellant filed this suit in the court below upon the supposed authority of 12 Stat. 696, as amended (U. S. C. A., Title 31, Sec. 231, and Title 18, Sec. 80), alleging that appellees had made a false claim against the United States within the meaning of the statute, in that they had represented to the Secretary of the

Treasury of the United States that Home Owners' Loan Corporation was in law and in fact a duly organized and existing corporation, when, it is alleged, Home Owners' Loan Corporation was not such a validly created and legally existing entity as was contemplated by the Home Owners' Loan Act of 1933, (48 Stat. 129; U. S. C. A., Title 12, Sec. 1463). By his amended complaint appellant further alleged that by said false claim and representation to the Secretary of the Treasury, appellees caused to be withdrawn from the Treasury and applied in payment for the capital stock of the Home Owners' Loan Corporation the sum of \$200,000,000. Appellant sought to recover under the statute double the amount alleged by him thus fraudulently to have been obtained from the Treasury, plus certain penalties.

In the court below, a motion to dismiss was filed by appellees upon the ground that the amended complaint did not state a claim upon which relief could be granted; and the court below sustained this motion to dismiss by its order entered November 9, 1939, the court having previously filed on October 31, 1939 the following memorandum-opinion:

“The amended complaint in the above entitled cause is dismissed on the authority of *Fletcher v. Jones, et al.*, 105 Federal (2nd) 58, where the creation and legal existence of the Home Owners' Loan Corporation is fully recognized.” Record, page 15.

There is no material dispute as to the facts, and for the purposes of this brief appellees accept as substantially correct the statement of facts incorporated in appellant's brief.

SUMMARY OF ARGUMENT.

I. Home Owners' Loan Corporation was properly and legally created.

II. Amended complaint does not show making of false claim against the Government of the United States.

III. Amended complaint was subject to dismissal for failure to state a claim upon which relief could be granted.

IV. Correction.

ARGUMENT.

I.

Home Owners' Loan Corporation Was Properly and Legally Created.

The gravamen of the amended complaint is that the appellees made false claims or statements that the Home Owners' Loan Corporation was "an existing body corporate", whereas it had only a charter of incorporation issued by the Federal Home Loan Bank Board. Appellant specifically based the case on the allegation that "the said [Federal Home Loan Bank] Board had failed to procure from any Sovereign power, Federal or State, a corporate charter for and in the name of the Home Owners' Loan Corporation, or taken any steps in that behalf, * * *."

Judicial notice will, of course, be taken of the fact that the Federal Home Loan Bank Board, pursuant to the Home Owner's Loan Act of 1933 (*supra*) created the Home Owners' Loan Corporation, the entire \$200,000,000 capital stock of which is owned by the United

States, issued it a charter, acted as its Board of Directors, and caused it to make loans totaling more than three billion dollars, secured by mortgages on more than a million homes, which loans are now being collected in the orderly manner contemplated by the Act. Moreover, this Court, in *Fletcher v. Jones et al.*, 105 F. (2d) 58, expressly held (against the same argument made by appellant) that the Home Owners' Loan Corporation was validly and legally created. That decision is, of course, completely decisive of the instant case. In it, this Court said:

"Congress has at different times adopted various methods for creating Federal or government corporations. In some instances it has directed or authorized administrative boards or officials to secure charters from states or from the District of Columbia. But this has been by no means the only method. In some cases it has created corporations by its own acts. In others it has authorized the President to create them, or to procure their creation. The method provided by the present Act was that the Federal Home Loan Bank Board should itself create the Home Owners' Loan Corporation. This, too, is a method which has been commonly used by Congress in the past.

"There is no more virtue in the act of corporate creation when performed by a state legislature, or by an officer of a state or of the District of Columbia under a general law, than when the ceremony is performed by a governmental officer or agency, specially designated by Congress for that purpose. That is what occurred in the present case. Congress provided the name of the corporation, designated its board of directors, specified its powers, and directed the Board to create it. * * * The duty imposed upon the officers of the Board in this case was to *create* a corporation, not to procure from some other sovereign a charter for that purpose.

* * * We take judicial notice of the fact that the Federal Home Loan Bank Board issued a charter to the Home Owners' Loan Corporation, immediately after the Act was approved in June, 1933; organized the Corporation and began its work six months prior to the transaction with Edna L. McCutchen, which occurred in January, 1934. These official acts have been recorded in the records and reports of the Board, which are public documents and to which reference properly may be made for this purpose, even though formal proof thereof was not made in the court below.

"The creation and legal existence of the Home Owners' Loan Corporation has been referred to and noticed by courts on a number of occasions, most recently by the Supreme Court itself in *Graves vs. New York ex rel. O'Keefe*, 59 S. Ct. 595, 596, 83 L. Ed. 927."

The court below, as stated, dismissed the amended complaint upon the authority of the decision of this Court in *Fletcher v. Jones et al.* (*supra*).

Appellant unsuccessfully sought a review by the Supreme Court of the United States of the decision of this Court in *Fletcher v. Jones et al.*, and that Court, in passing upon the petition, said: "The motion for leave to proceed further herein in *forma pauperis* is denied for the reason that the Court, upon examination of the papers herein submitted, finds no ground upon which writ of certiorari should be issued. The petition for writ of certiorari is therefore also denied." (308 U. S. 555, Adv. Op., 84 L. ed. 71.) Nevertheless, appellant says that this Court erred in its decision in *Fletcher v. Jones et al.*, and in its opinion misinterpreted the applicable law, and we shall answer the attack thus made.

The appellant, in his brief, has attacked particularly the accuracy of footnote 8 on page 60 of said decision.

In footnote 8, this Court said: "Thus, the Federal Prison Industries, Inc. was to be incorporated by executive order, pursuant to the provisions of the Act of June 23, 1934, 48 Stat. 1211, 18 U. S. C. Sec. 744i." Appellant states in his brief that the Federal Prison Industries, Inc. was actually created by a charter granted by the Recorder of Deeds of the District of Columbia, after articles of incorporation had been filed therefor. Regardless of how it may actually have been incorporated, the Federal Prison Industries, Inc. could have been incorporated by executive order, as the Act provided that, "the President is hereby authorized and empowered, in his discretion, to create a body corporate of the District of Columbia to be known as 'Federal Prison Industries', which shall be a governmental body."

In footnote 8, this Court further said: "Under the Act of May 16, 1918, 40 Stat. 550, 551, the President was authorized to create housing corporations." In attacking this statement of the footnote, appellant quotes, not from 40 Stat. 550, 551, but from 40 Stat. 595, the provision that: "The President, if in his judgment such action is deemed necessary or advantageous, may authorize the creation of a corporation," etc., and states that the United States Housing Corporation was actually granted a charter by the State of New York on July 8, 1918, after articles of incorporation had been filed therefor. However, by turning to the citation given by the court, *i. e.* 40 Stat. 550, 551, there is found on page 551 the following: "The President may exercise any power or discretion herein granted, and may enter into any arrangement or contract incidental thereto, through such agency or agencies as he may *create* or designate"; etc. (Emphasis added.)

In footnote 8, this Court said: "Likewise, under the Act of August 10, 1917, 40 Stat. 276, and the Act of June 16, 1933, 48 Stat. 195, 15 U.S.C. Sec. 702." Appellant attacks this by saying: "There is not a single word in said Acts, or either of them, even suggesting the creation of corporations." By turning to the first citation, *i. e.* 40 Stat. 276, the following provision of the Act is found: "Sec. 2. That in carrying out the purposes of this Act the President is authorized to enter into any voluntary arrangement or agreement, to *create* and use any agency or agencies, to accept the services," etc. (Emphasis added.)

Nowhere in his brief does appellant attack the correctness or accuracy of footnote 9, on page 60, supporting the statement of this Court that the creation of the Home Owners' Loan Corporaion by the Federal Home Loan Bank Board itself, was a method commonly used by Congress in the past. The footnote was as follows:

"Thus, under the Federal Farm Loan Act of July 17, 1916, 39 Stat. 360, Federal Land Banks were to be duly incorporated by the making and filing of an organization certificate with the Federal Farm Loan Board. Federal Intermediate Credit Banks are created by a similar procedure. Act of March 4, 1923, 42 Stat. 1454, 12 U. S. C. A. Secs. 1021, 1026. Under the same Act, National Agricultural Credit Corporations were to be created by the Comptroller of the Currency, 42 Stat. 1461, 12 U.S.C.A. Sec. 1171. National Banks are incorporated by filing an organization certificate with the same official. Act of June 3, 1864, R. S. Secs. 5133-5136, 12 U.S.C.A. Secs. 21-24. The Federal Home Loan Bank Board is authorized to organize, incorporate, and issue charters to 'Federal Savings and Loan Associations.' Act of June 13, 1933, 48 Stat. 128, 132, 12 U.S.C.A. Sec. 1464.

Production Credit Corporations, Banks for Cooperatives, and a Central Bank for Cooperatives were authorized to be created by the Governor of the Farm Credit Administration. Act of June 16, 1933, 48 Stat. 257, 12 U. S. C. A. Secs. 1131, 1134, 1134f."

If, in creating the Home Owners' Loan Corporation and issuing the charter, the Federal Home Loan Bank Board had attempted to give the Corporation substantial and independent powers in addition to those outlined in the Act, those powers might have been successfully attacked, but there is nothing of that kind involved in this case, as no such powers were sought to be given. Appellant is merely continuing his effort, regardless of the above decision of this Court, to pick the same alleged flaw in the creation of the Corporation, and to torture it into a cause of action under U.S.C.A., Title 31, Sec. 231 and Title 18, Sec. 80. He has, of course, failed completely.

Appellees submit that under the correct interpretation of the Home Owners' Loan Act of 1933 the obtaining of a charter from some authority, Federal or State, other than the Federal Home Loan Bank Board was not a requirement of the Act nor a condition precedent to the lawful existence of the Home Owners' Loan Corporation. They submit that the Act is complete in itself, requiring no further action by any Sovereign power before the Corporation could validly come into existence, and that the only further action necessary was action on the part of the Board. If this be true, they submit, the basis of appellant's contention of want of corporate existence is swept away, because the foundation of his position consists in reading into the act a requirement that did not and does not exist in fact or in law.

The Board made no mistake in the manner in which it proceeded under the Act. In fact, it did exactly what the Act directed it to do. It "created" the Home Owners' Loan Corporation. Having been directed by the Act to "create a corporation to be known as the Home Owners' Loan Corporation", and the Act having defined in detail all of the powers and duties of the Corporation, what more sensible thing could the Board have done than to create the Corporation by action entered on its own minutes and the issuance of a charter of incorporation? This complied fully with the three definitions given to the word "create" by all first class dictionaries, *i. e.* "to cause to come into existence", "to form out of nothing" and "to originate". Congress of course had the power to direct the creation in any manner it saw fit. Any means of creating a corporation which the sovereign may see fit to adopt are appropriate, and no particular form of words is necessary in the charter or statute, it being sufficient if the intent to incorporate is evident. 13 Am. Jur. 175; *Hancock v. L. & N. R. Co.*, 145 U. S. 409, 36 L. ed. 755, 12 S. Ct. 969; *Conservators of River Tone v. Ash*, 10 Barn. & C. 349, 109 Eng. Reprint 479, 7 Eng. Rul. Cas. 239; Annotation: 7 Eng. Rul. Cas. 257; *Liverpool Ins. Co. v. Massachusetts*, 10 Wall. (U. S.) 566, 19 L. ed. 1029.

Moreover, Congress in the enactment of legislation has again and again recognized the Home Owners' Loan Corporation as a validly created and actively existing and functioning Government corporation and instrumentality of the United States. By the Act of April 27, 1934 (48 Stat. 643, U.S.C.A., Title 12, Sec. 1463(c)) providing for the guarantee of the bonds of the Corporation; by the National Housing Act of June 27, 1934 (48 Stat. 1263, U.S.C.A., Title 12, Sec. 1463(c))

increasing the amount of bonds the Corporation might issue to \$3,000,000,000, and by the Act of May 28, 1935 (49 Stat. 296, U.S.C.A., Title 12, Sec. 1463(c)) increasing the amount of bonds the Corporation might issue to \$4,750,000,000, Congress directly and affirmatively recognized the validity and existence of the Corporation.

Other acts of Congress recognizing the validity and existence of the Corporation were an Act of March 27, 1934 (48 Stat. 506, D. C. Code, Sup. V, Title 5, Sec. 56), authorizing certain building associations to exchange their bonds for the bonds of the Corporation; an Act of June 19, 1934 (48 Stat. 1153, D. C. Code, Sup. V, Title 5, Sec. 218hh) authorizing certain insurance companies to acquire bonds of the Corporation; the National Housing Act of June 27, 1934 (48 Stat. 1256, U. S. C. A., Title 12, Sec. 1725) directing the Corporation to subscribe and pay for the \$100,000,000 capital stock of the Federal Savings and Loan Insurance Corporation; an Act of August 23, 1935 (49 Stat. 709, U. S. C. A., Title 12, Sec. 24) exempting certain corporations engaged solely in holding obligations of the Corporation; an Act of June 23, 1936 (49 Stat. 1845) providing that sums might be transferred to certain Treasury Department appropriations from funds available for the Corporation; an Act of May 14, 1937 (50 Stat. 155) similar to the last Act mentioned; an Act of June 22, 1936 (49 Stat. 1647) prohibiting the Corporation after June 30, 1937 from incurring any obligations for administrative expenses except pursuant to an annual appropriation therefor; an Act of June 28, 1937 (50 Stat. 349) appropriating \$30,000,000 of the Corporation's funds for its administrative expenses for the fiscal year 1938; an Act of May 23, 1938 (52 Stat. 432) appropriating \$26,500,000 of the Corpo-

ration's funds for its administrative expenses for the fiscal year 1939; an Act of March 16, 1939 (53 Stat. 546) appropriating \$24,500,000 of the Corporation's funds for its administrative expenses for the fiscal year 1940; and an Act of April 18, 1940 (76th Congress, Pub. No. 459) appropriating \$22,000,000 of the Corporation's funds for its administrative expenses for the fiscal year 1941.

The effect of these Acts of Congress recognizing the existence of the Corporation had the effect of validating and curing any and all defects or flaws, if any, that might have been found in the creation and organization of the Corporation. *Town of Andes v. Ely*, 158 U.S. 312; 39 L. ed. 996; *Atlantic, etc. R. Co. v. St. Louis*, 66 Mo. 228; *West v. State*, 53 Mo. 277, 168 Ala. 1; *Koch v. North Ave. R. Co.*, 23 Atl. 463, 75 Md. 222, 15 L. R. A. 377.

II.

Amended Complaint Does Not Show Making of False Claim Against the Government of the United States.

The allegations of fact set out in the amended complaint do not constitute the making of such a false claim against the Government of the United States as is contemplated by the statute relied upon. The statute, 12 Stat. 696, as amended (See U.S.C.A., Title 31, Sec. 231 and Title 18, Sec. 80), states substantially that any person making any claim against the Government of the United States or any department or officer thereof knowing the claim to be false, fictitious or fraudulent shall pay, among other things, double the damages suffered by the United States by reason of the doing or committing of such act.

“* * * The statute is plainly penal in its nature, and is not to be enlarged by implication; and, unless it be so enlarged, no statutory authority exists for plaintiffs’ suits.” *Olson v. Mellon*, 4 F. Supp. 947 (1933).

In *United States ex rel Kessler v. Mercur Corp.*, 83 F.(2d) 178, cert. den. (1936) 299 U. S. 576, 81 L. ed. 424, Judge Augustus Hand, in considering 12 Stat. 696 which subsequently became R. S. 5438 (which made a false claim a crime) and R. S. 3490, 3491 (which allowed relator double damages for the prosecution of such a claim) said:

“While section 5438 was amended, repealed, and finally since the time when it was referred to in section 3490 superseded by a broader enactment (18 U.S.C.A. Sec. 80), it stands, so far as section 3490 is concerned, as it was written when incorporated by reference. It is quite immaterial that the superseding act alone appears in the United States Code, for the Code only embodies a prima facie statement of the statutory law. It is well settled that where a statute incorporates another, and the one incorporated is thereafter amended or repealed, the scope of the incorporating statute remains intact and ‘no subsequent legislation has ever been supposed to affect it.’ * * *”

From the above, it appears that appellants’ action was limited to a recovery of a penalty and double damages for the commission of a violation of the acts declared criminal in section one of the original act, 12 Stat. 696. In *U. S. ex rel. Boyd v. McMurtry*, 5 F. Supp. 515 (1933), the Court said:

“Section 231 (Rev. St. Sec. 3490) does not, in terms, define the causes of action therein created; but it refers to Rev. St. Sec. 5438, for enumera-

tion of such causes of action. When we turn to section 5438 and learn its legislative history, we find, as heretofore stated, that prior to October 23, 1918, the only offenses therein denounced were those having to do with the making of fraudulent claims against the government. Therefore such acts must be held to have been the causes of action created by section 3490 of Revised Statutes (section 231, title 31 USCA), and authorized to be maintained by a private citizen by section 3491, Revised Statutes (section 232, title 31 USCA)."

It is submitted that appellees herein did not commit any act relating to a false, fraudulent or fictitious claim within the meaning of the word "claim" as used in 12 Stat. 696, which, it must be remembered, is penal in nature.

In the case at bar, no loss is shown as a result of any alleged false or fraudulent claim or representation. Congress had instructed the United States Treasury to purchase \$200,000,000 worth of stock in the Home Owners' Loan Corporation, thereby manifesting its intention that such sum be expended. There is no question raised as to whether the Government got what it paid for. The mere fact that money is expended, even if such expenditure was occasioned by a false or fraudulent representation or claim, is not in itself conclusive that a loss occurred to the Government thereby. It is noteworthy that the statute relied on by the appellant provides that the appellant may sue and recover "double the amount of damages which the United States may have sustained by reason of the doing or committing such act (which must relate to a false claim) * * *."

It is believed that it sufficiently appears in the case at bar that no pecuniary or property loss occurred.

The amended complaint in the present case itself sets out the authority of the Home Owners' Loan Corporation to receive \$200,000,000 from the United States Treasury, and in the absence of any showing that the appellees converted said money to their own use, it is to be presumed that this money was expended for the benefit of the Home Owners' Loan Corporation, whether or not it is a body corporate, and in consequence the United States Government. The court can judicially notice that the Congress and the United States got what they paid for when the \$200,000,000 was actually expended, and that the Home Owners' Loan Corporation, whether or not a body corporate, relieved distressed home owners in the manner intended by Congress in the Home Owners' Loan Act of 1933. It is apparent that the actual expenditure of the funds is not the basis upon which the appellant brought this suit. The gist of the offense committed by these appellees, according to appellant's theory, seems to be that they, by means of false representations, procured the setting up of an account in the United States Treasury. It is submitted that no loss can be shown where the actual funds alleged to be the subject of the loss remain in the vaults of the Treasury of the United States.

Assuming in accordance with appellant's allegations that Home Owners' Loan Corporation is not and never was a corporation, in connection with a "demand" upon the Secretary of the Treasury for subscription to stock there would still be no "claim" by the appellees against the Government or an officer thereof or, if it constituted a "claim" within the meaning of the statutes, no damages accrued by reason of the acts alleged.

The management of Home Owners' Loan Corporation, whether or not a corporation, is entrusted by statute to the Federal Home Loan Bank Board, the members of which are officers of the United States Government engaged in carrying out the mandate of Congress pursuant to the provisions of Home Owners' Loan Act of 1933, as amended.

The appellees did not make a claim against the Government for or on behalf of themselves or for or on behalf of any other person, *nor does appellant so allege*. If any claim was made it was made for Home Owners' Loan Corporation and if there was not an entity in existence capable of receiving this money then the claim, if it was a claim, was made for appellees as officers of the United States Government and handled and administered by them as such. The statute in question does not cover intra-governmental transactions.

It is not alleged that appellees themselves benefited from a false claim, the allegation being that money was transferred from one account in the Treasury of the United States to another, with no allegation that same was not used in accordance with the dictates of Congress as expressed in the Home Owners' Loan Act of 1933, as amended.

In *Russell Wheel & Foundry Co. v. United States*, 31 F. (2d) 826 (CCA 6th) (1929) the court in allowing the United States to recover an erroneous overpayment by the United States Shipping Board Emergency Fleet Corporation said, "This money was no less public revenue in the hands of the Fleet Corporation than it was in the Treasury. * * * The money was plaintiff's (the United States') property." Thus if there is no Corporation in existence the money received from the Secretary of the Treasury and handled by the Board is still property of the United States Government being

expended in accordance with the provisions of the Home Owners' Loan Act of 1933, as amended, by officers of the United States Government, whether as directors of the Home Owners' Loan Corporation or not.

It appears that the only grave offense alleged by appellant to have been committed by the appellees was representation that Home Owners' Loan Corporation was an existing corporation when, appellant alleges, Home Owners' Loan Corporation was not such. However, so far as the instant case is concerned, it does not make any difference whether a corporate entity exists or not. No allegation is made to the effect that the intent of Congress as expressed in the Home Owners' Loan Act of 1933, as amended, is not being carried out. What has evolved and is now operating is sufficient for the purposes of Home Owners' Loan Act of 1933, as amended, regardless of whether any technical incorporation occurred.

In *United States v. Cohn*, 270 U. S. 339, 70 L. ed. 616, the Supreme Court of the United States said:

“ * * * While the word ‘claim’ may sometimes be used in the broad juridical sense of ‘a demand of some matter as of right made by one person upon another, to do or forbear to do some act or thing as a matter of duty’ * * * it is clear in the light of the entire context, that in the present statute, the provisions relating to the payment or approval of a ‘claim upon or against’ the government relates solely to the payment or approval of a claim for money or property to which a right is asserted against the government, based upon the government’s own liability to the claimant * * * .”

So far as the good faith of appellees is concerned, as early as August 22, 1933 the Attorney General of the United States had rendered an opinion that the Home

Owners' Loan Corporation was validly organized (37 Op. Atty. Gen. 241) and in so ruling had referred to "the charter of Home Owners' Loan Corporation, as adopted by the Federal Home Loan Bank Board on June 14, 1933".

III.

Amended Complaint Was Subject to Dismissal for Failure to State a Claim Upon Which Relief Could Be Granted.

Appellant quotes U.S.C.A., Title 31, Sec. 232, providing that "such suit * * * shall not be withdrawn or discontinued without the consent, in writing, of the judge of the court and the district attorney, first filed in the cause, setting forth their reasons for such consent," and argues that the trial court had no power without the written consent of the district attorney to sustain the motion to dismiss on the ground that the amended complaint failed to state a claim upon which relief could be granted and to dismiss the suit. Since the suit was on the relation of appellant and not on the relation of the district attorney, the court could not have permitted appellant to withdraw or discontinue it without the consent, in writing, of the district attorney filed in the case, but there is no prohibition in said Section against the Court *dismissing* the case on motion challenging the sufficiency of the complaint when the Court reaches the conclusion that the complaint fails to state a cause of action or claim upon which relief can be granted.

It is to be noted that the statute used the term "withdrawn or discontinued" while appellant assumes that this is similar to "dismissed". It is not denied that this suit could not be "discontinued" except as

provided by the statute. It is denied that this suit cannot be dismissed by the present motion since dismissed means neither "withdrawn" nor "discontinued."

Appellant's misuse of the word "dismissed" can probably be explained by the following quotation from *Brown v. Brown*, 37 N. H. 536, 538:

"So the usual course of a party, who for any reason desires to abandon the further prosecution of his libel, is to move that it may be dismissed, which is usually done without any entry of his motion. In such a case the entry, 'dismissed' is undistinguishable from the same entry made by order of the court upon a full examination of the evidence. The latter, as a decision upon the merits, is final; while the former, as a mere *nol. pros.*, is not evidence. 2 Cow. & Hill's Notes 120.

"To avoid the bar presumptively arising from such a decree, the party should see that the entry of his motion to dismiss be made on the record, or that the entry be made as in chancery cases, 'without prejudice to any future proceeding.' "

Thus the word "dismissed" can possibly have two meanings, one wherein the plaintiff desires to abandon further prosecution and the other where the court makes a final determination. Since the word "dismissed" was not used in the statute which controls, there is no need to determine which of these meanings would control had such word been used in the statute. The only problem is whether or not "withdrawn or discontinued" means "dismissed", and it is believed that the words in the statute can mean "dismissed" only if this latter term is used to mean a suit abandoned by the plaintiff or a "dismissal" procured by the plaintiff. That such is not the usual use of the word "dismissed" appears from the following quotations.

In *Dowling v. Polack*, 18 Cal. 625, 628, the Court said:

“* * * In effect, a dismissal is a final judgment in favor of the defendant; and although it may not preclude the plaintiff from bringing a new suit, there is no doubt that for all purposes connected with the proceedings in the particular action, the rights of the parties are affected by it in the same manner as if there had been an adjudication upon the merits.”

In *Hargis v. Robinson*, 70 Kans. 589, 79 Pac. 119, 121, the Court said:

“* * * A dismissal under our practice differs from some of those suggested by plaintiffs in error in this: that it is a judicial act, rather than the act of the party. Whether ‘with prejudice’ or ‘without prejudice’, it is in the nature of a judgment; and a judgment ‘with prejudice’, not set aside or reversed, is a final disposition of the controversy.
* * *”

Since the United States is as much a party plaintiff in *qui tam* actions as the appellant, it is not surprising that the Congress made provisions for the consent of officers of the United States before prosecutions of such actions could be dropped. If the Congress had provided in U.S.C.A., Title 31, Sec. 232, that such suits could not be “dismissed” without the consent of the district attorney, it would have impaired the jurisdiction granted the stated courts in the first sentence of that Section. Since the Congress did not use the word “dismissed”, it must be inferred therefrom that it had no intention of so impairing the court’s jurisdiction.

It seems clear that the reason *qui tam* suits cannot be withdrawn or discontinued without the consent of the judge and district attorney is to prevent any settle-

ment which might prejudice the rights and interests of the United States. Thus it is submitted that "withdrawn or discontinued" refers only to a situation wherein a relator attempts to abandon or fails to prosecute his suit.

Further evidence of this appears in definitions of the word "discontinuance." In *Farmers' Oil & Mfg. Co. v. Melton & Stuart*, 159 Ala. 469, 49 So. 225, 226, the Court said:

"A discontinuance is in substance and effect an abandonment by the moving party of his pending cause. It is a mere gap or chasm in the proceedings, occurring while the suit is pending. It is nothing more than an action or declaration of the plaintiff's willingness to stop the pending action. It is not an adjudication of his cause by the proper tribunal, nor is it an acknowledgment by himself that his claim is not well founded, nor can it amount to a bar of another action."

In *Hadwin v. Southern Ry. Co.*, 67 S. C., 463, 45 S. E. 1019, 1020, the Court said:

"* * * 'The term "discontinuance" is the name applied to the voluntary withdrawal of a suit by a plaintiff, or where he is regarded as out of court by some technical omission or misleading and the like.' * * *"

This latest quotation indicates that the words "withdrawal" and "discontinuance" are similar. The only difference between "withdrawn and discontinued" that occurs to appellees, and this is substantiated by definitions of these words in Webster's New International Dictionary, Second Edition, is that to "withdraw" would indicate affirmative action upon the part of somebody capable of affirmatively indicating his desire to no

longer prosecute his claim whereas "discontinue" would seem merely the failure of one prosecuting a claim to continue to affirmatively prosecute such claim.

Since the appellant subjected himself to the jurisdiction of the trial court, he thereby admitted the capability of the trial court to exercise the usual incidents of jurisdiction, one of which was the dismissal of the suit because unfounded in fact and law. It is true that the statute prevented the withdrawal or discontinuance of this suit except in the manner therein provided, but it is patent that only the party responsible for the bringing of the suit could withdraw or discontinue it. Appellees were incapable of withdrawing or discontinuing it. The trial court, however, had jurisdiction to "dismiss" the suit upon the ground that the complaint failed to state a cause of action or claim upon which relief could be granted.

IV.

Correction.

Although not material to the determination of this case, there is one erroneous averment by appellant. Referring to the amended complaint, appellant states, on page two of his brief: "Thereafter and on June 14, 1933, said Federal Home Loan Bank Board, *which was composed* of the appellees * * *." (Emphasis added.) At no place in the amended complaint (R. 2-13) is it alleged that the Federal Home Loan Bank Board is or ever was composed of the appellees herein. The Marshal's return on summons issued (R. 13) discloses that of the nine defendants named in the amended complaint (R. 2-3) only six were served. Those six are the appellees herein, and of that number neither Patrick J. Maloney nor Robert L. Nagle ever served as a

member of the Federal Home Loan Bank Board and no allegation that either did is found in the amended complaint. The term "said appellees" is used frequently by appellant in his "Statement of the Case" in discussing the contents of the amended complaint without distinction, as was done in the amended complaint between those of the appellees serving as members of the Federal Home Loan Bank Board and those serving the Board or the Home Owners' Loan Corporation in other capacities.

CONCLUSION.

It is respectfully submitted that the action of the trial court in sustaining the motion to dismiss because no cause of action was stated in the complaint and in dismissing the suit should be affirmed.

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA.

No. 7568.

UNITED STATES OF AMERICA, ACTING ON THE
RELATION OF EDMOND C. FLETCHER, AND
THE SAID EDMOND C. FLETCHER, INDIVIDUALLY,
APPELLANT,

VS.

JOHN H. FAHEY ET AL., APPELLEES.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES
FOR THE DISTRICT OF COLUMBIA.

REPLY BRIEF FOR APPELLANT.

EDMOND C. FLETCHER,
103 C Street, S. E.,
Washington, D. C.,
Pro se, Appellant.

Argued
Before *Granger,*
Luttrell,
O. A. Smith
12/11/11

DLG

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APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES
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REPLY BRIEF FOR APPELLANT.

Appellees, in their brief, at the bottom of page 2, admit the correctness of the statement of facts incorporated in appellant's original brief. Thus, the court is confined to a consideration of such facts, and none other. Nevertheless, and in disregard of Rule 8 of the rules of this court, the appellees' brief contains a

"Statement of Facts" and a "Summary of Argument," followed by an argument of the questions and statutes which they themselves present, rather than to respond to the appellant's presentation of the errors assigned, questions raised, statutes involved, and authorities cited, 20 in number. For example, the appellees' brief, in the first three lines, declares the following: "Appellant filed this suit in the court below upon the supposed authority of 12 Stat. 696, as amended (United States Code Annotated, Title 31, Section 231, and Title 18, Section 80)." These same statutes are twice again cited in their brief, pages 8 and 11, and form the basis of their argument. Yet the record (R. 2) shows that the statutes, upon which this suit was founded, are wholly different statutes, namely, Sections 231, 232, 234, and 235, Title 31, United States Code, 1934 Ed.). And these statutes are fully set out in the appendix to appellant's brief, a copy of which, and the record, were in the hands of appellees' counsel at the time when they committed such error.

In appellees' brief, page 3, they declare that the "gravamen of the amended complaint is that the appellees made false claims or statements that the Home Owners' Loan Corporation was an existing body corporate, whereas it had only a charter of incorporation issued by the Federal Home Loan Bank Board." This statement, as to the "gravamen of the amended complaint," is disputed by appellant. On the contrary, such gravamen is, Whether the undated and unsigned paper writing, conceived and drafted by an attorney for the

Federal Home Loan Bank Board, and by it adopted of record on June 14, 1933 (pleaded *in haec verba* in the complaint), is a valid corporate charter for the Home Owners' Loan Corporation, within the meaning of Section 4 (a) of the Home Owners' Loan Act of 1933. This question was presented in appellant's brief at page 6, with a full argument thereon, but the appellees have adroitly evaded that very question.

Appellees, in their brief at page 3, make the bold assertion that this court will take judicial notice of what they allege as facts, even though not suggested or in anywise brought to the attention of the trial court for consideration, to-wit:

"Judicial notice will, of course, be taken of the fact that the Federal Home Loan Bank Board, pursuant to the Home Owners' Loan Act of 1933 (*supra*) created the Home Owners' Loan Corporation, the entire capital stock of which is owned by the United States, issued it a charter, acted as its board of directors, and caused it to make loans totaling more than three billion dollars, secured by mortgages on more than a million homes, which loans are now being collected in the orderly manner contemplated by the act."

The above words, if judicially noticed as facts by this or any other appellate court, would constitute a monumental judicial fraud upon the public. But these suggested facts do not appear on the face of the amended complaint, and are not in the record now before this court. Hence they are not in this case at all. Judicial notice of fact comes in the place of proof. *It is to be*

exercised by a tribunal, which has power to pass upon the facts, and not by an appellate court whose function is to review the facts as shown by the record. The decisions of the courts are unanimous on this proposition. Some of them are now cited, as follows:

Judicial Notice Must Be Requested in Trial Court, and, If Not, Cannot Be Raised in Appellate Court.

“In most instances, if the attention of the trial court is not called to a fact within its judicial knowledge, and such fact is not judicially noticed, the point is waived and cannot be raised any time on appeal. The explanation is that facts susceptible of notice are nevertheless matters of evidence and an appellate tribunal can only review evidence considered by the court below.”

- 1 Jones on Evidence, Section 474; citing
Line v. Line, 119 Md. 403.
- Fassler v. Street*, 92 Neb. 786.
- Wood v. Northwestern Ins. Co.*, 46 N. Y. 421.
- North Hempstead v. Gregory*, 53 App. Div. 350,
65 N. Y. S. 867.
- Bang v. McAvary*, 52 App. Div. 501, 65 N. Y. S.
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- Walton v. Stafford*, 14 App. Div. 310, 43 N. Y. S.
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- Mears v. Humbolt Ins. Co.*, 92 Pa. St. 15.
- McKee v. Gordon*, 85 Vt. 253.
- Christy v. Wabash*, 195 Mo. App. 232, 241.
- Town of South Ottawa v. Perkins*, 94 U. S.
260, 268.
- Robinson v. Baltimore & Ohio R. Co.*, 222
U. S. 506, 512.

In *Wood v. Northwestern Ins. Co.*, 46 N. Y. 421, 426, it was said:

"But judicial notice comes in the place of proof. It is to be exercised by a tribunal *which has power to pass upon the facts*. That, this court has not in this case. We may not when we have not the finding of fact for review, for the purpose of reviewing the judgment of a referee, take judicial notice of the existence of a fact, *which has not been found by the court below*, nor upon which a finding has been refused."

In *Walton v. Stafford*, 43 N. Y. S. 1049, 1051, it was said:

"It is, however, suggested that the 1st day of January fell on Sunday, and that, therefore, the obligation accrued on the next day—Monday, January 2d—which was the day when the assignment was executed and delivered. *Nothing of the kind appears in the record, and the suggestion is made for the first time upon this appeal.* * * * We are asked to supplement this fact with another fact, which has never been agreed upon, and to do so by taking judicial notice of the coincident of the day of the week with this day of the month. We do not think this would be proper upon the present appeal. The matter was not called to the attention of the court upon the trial, nor was the court asked to take judicial notice of the fact now suggested, or to consider any fact in addition to those agreed upon. That the 1st day of January fell upon Sunday was a fact like any other fact. It is true that it was not a fact which defendants were bound to prove in the ordinary way, but it

was nonetheless a fact which they were required, if they desired its consideration, to place in some way before the jury. They were at least bound to bring the fact to the attention of the court, and to claim for it judicial notice. *If they did not do this, the fact is not in the case*, and it cannot be got into the case without giving the stipulation an effect not contemplated by the parties when they entered into it. *It is our duty to give the appropriate judgment solely upon those facts which the defendants chose to present below, and which alone appears in the record.* We can add neither independent facts nor additional facts tending to vary the ordinary effect of those specified in the stipulation."

In *Christy v. Wabash*, 195 Mo. App. 232, 241, it was said:

"But there are other things which, from motives of public policy, the law requires the court to judicially notice, or have knowledge of, but of which, in reality, it is ignorant. *It is the duty of a litigant desiring the advantage of that knowledge, to suggest it to the court and to assist the court in examining at the proper sources for actual information.* It is said in note, page 4, 1 Taylor's Evidence, that Lord Ellenborough even refused to take notice of the king's proclamation 'on the ground that the Gazette containing it was not produced.'

The Supreme Court of the United States, speaking in reference to the questions, said that it was the duty of the courts to take judicial notice of legislative journal entries in Illinois, but that 'The courts of Illinois may decline to take that trouble, unless the parties bring the matter to their atten-

tion' (*Town of South Ottawa v. Perkins*, 94 U. S. 260, 268). See, also, *State v. Wray*, 109 Mo. 594, 598. Such notice should have been invoked by the defendant (*Walton v. Stafford*, 43 N. Y. S. 1049; 4 Wigmore on Evidence, Section 2568).

The present instance is an apt illustration of the wisdom of the rule requiring the litigant to invoke the court's judicial knowledge. A particular order, made by the interstate railroad commissioners, is not a thing which a court could seasonably know unless its attention is called thereto, and, possibly, the means afforded, if required, for the court to ascertain whether such order in fact existed.

But in addition to this, these orders, as we have said, were never mentioned in the trial court, nor were they referred to in this court, and to bring them into the case at this day, would violate the rule in this state that the case must be determined, on appeal, on the same theory presented in the trial court."

In *Robinson v. Baltimore & Ohio R. R. Co.*, 222 U. S. 506, 512, the Supreme Court said:

"Undoubtedly, this provision (Sec. 14 of 25 Stat. 855) makes the decisions of the commission, as it published, admissible in evidence with other proof of their genuineness, but it does not require them to be judicial notices or relieve litigants from offering them in evidence as they would any other competent evidence intended to be relied upon."

Appellees, in their brief at page 4, cite the case of *Fletcher v. Jones et al.*, 105 F. 2d 58, decided by this

court, as authority for the declaration that the "Home Owners' Loan Corporation was validly and legally created." But, it is the charter, not the courts, which creates a corporation. In *Osborn v. United States*, 9 Wheat. 738, 823, Mr. Chief Justice Marshall, speaking for the Supreme Court, declared:

"The case of the bank is, we think, a very strong case of this character. The charter of incorporation not only creates it, but gives it every facility which it possesses. The power to acquire rights of any description, to transact business of every description, to make contracts of any description, to sue on those contracts, is given and measured by the charter, and the charter is the law of the United States."

See, also, *Roberts v. Northern Pac. R. Co.*, 158 U. S. 1, 22.

Moreover, in the case of *Fletcher v. Jones et al.*, *supra*, there was no undated and unsigned paper writing, called a "charter" of the Home Owners' Loan Corporation, which is now set forth *in haec verba* in the record in the case at bar. This court may now scrutinize it, from top to bottom, and then determine its legal effect. Furthermore, in that case, the court merely concluded to take *judicial notice* of the fact that the Federal Home Loan Bank issued a charter to the Home Owners' Loan Corporation, immediately after the act was approved in June, 1933—the exercise of such judicial notice being wholly improper and forbidden by the foregoing decisions of many courts in this country. Not only this, but the Home Owners' Loan Act of 1933 did not even mention or

refer to a "charter" in respect to the Home Owners' Loan Corporation. Hence, this court, in the case, *supra*, unlawfully took judicial notice of an unauthorized and unlawful act of the Federal Home Loan Bank Board, in order to make valid that which is void *ab initio*. Again, in this particular case, this court said:

"The creation and legal existence of the Home Owners' Loan Corporation has been referred to and noticed by courts on a number of occasions, most recently by the Supreme Court itself in *Graves v. New York ex rel. O'Keefe*, 59 S. Ct. 595, 596, 83 L. Ed. 927."

And, again, this court was mistaken. For, in the case cited, namely, *Graves v. New York ex rel. O'Keefe*, 59 S. Ct. 595, 596, 83 L. Ed. 927 (306 U. S. 466), the petitioner, by his pleadings, admitted the existence of the Home Owners' Loan Corporation as a body corporate, so there was no question raised as to its legal existence, and the Supreme Court, speaking through Mr. Justice Stone, declared the following:

"For the purposes of this case we may assume that the creation of the Home Owners' Loan Corporation was a constitutional exercise of the powers of the Federal Government."

In *Pittman v. Home Owners' Loan Corporation*, 308 U. S. 21, 32, where the validity of the Home Owners' Loan Corporation was not in issue, Mr. Chief Justice Hughes, on behalf of the Supreme Court, said:

"We assume here, as we assumed in *Graves v. New York ex rel. O'Keefe*, 306 U. S. 466, that the

creation of the Home Owners' Loan Corporation was a constitutional exercise of the congressional power."

In *Kay v. United States*, 303 U. S. 1, the attorney for the United States, by his pleadings, told the trial court that the Home Owners' Loan Corporation was an existing body corporate, and this was not challenged by the defendant, so he was convicted of having violated the Home Owners' Loan Act of 1933. A Mr. Newman, an attorney for the United States in that case, is now one of the attorneys in the case at bar.

So, from the foregoing, it is seen that the creation and legal existence of the Home Owners' Loan Corporation has never been recognized or noticed by the courts, as said by this court in *Fletcher v. Jones et al.*, *supra*. And the appellees are now challenged to name a single case, where such invalidity was even raised.

And the appellant, therefore, now asks this court, now sitting in the case at bar, to disregard and repudiate its prior decision in *Fletcher v. Jones et al.*, on the grounds heretofore announced. For, in *Davis v. Davis*, 68 App. D. C. 240, 242, this court recently said:

"The court has power, under some circumstances, to disregard a prior decision, although it should not be exercised except in a clear case (*Williams v. Order of Commercial Travelers*, 6 Cir., 41 F. 2d 745) where the earlier adjudication was plainly wrong."

Appellees, in their brief at page 5, assert that the appellant unsuccessfully sought a review by the Supreme Court of the United States of the decision of this court in *Fletcher v. Jones et al.*, and that court, in passing upon the petition, said:

“The motion for leave to proceed further herein *in forma pauperis* is denied for the reason that the court, upon examination of the papers herein submitted, finds no ground upon which writ of certiorari should be issued. The petition for writ of certiorari is therefore denied.”

By this declaration, the appellees seem to think that the question on the merits was really decided by the Supreme Court, but such was not the case. For, in *United States v. Carver*, 260 U. S. 482, 490, Mr. Justice Holmes, on behalf of that court, declared:

“The denial of a writ of certiorari imports no expression of opinion upon the merits of the case, as the bar has been told many times.”

Appellees, in their brief, at page 8, declare:

“Appellees submit that under the correct interpretation of the Home Owners’ Loan Act of 1933 the obtaining of a charter from some authority, federal or state, other than the Federal Home Loan Board was not a requirement of the act nor a condition precedent to the lawful existence of the Home Owners’ Loan Corporation.”

This assertion is such as to demand a quotation from the case of *Boyd v. United States*, 116 U. S. 616, 635, as follows:

"It may be that it is the obnoxious thing in the mildest and least repulsive form; but illegitimate and unconstitutional practices get their first footing in that way, namely, by silent approaches and slight deviations from legal modes of procedure. * * * It is the duty of the courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon. Their motto should be *obsta principiis*."

If the appellees' contention be true, as here expressed, then why did the Congress enact general incorporation laws in the District of Columbia? The answer is that the governmental powers might be more properly carried out. "The principle that a corporate charter is a *contract* between the state and the corporation and its members was established in *Trustees of Dartmouth College v. Woodward*, 4 Wheat. 518, 629, and has been reaffirmed many times." *Northwest Steel Rolling Mills v. Commissioner of Internal Revenue*, 110 F. 2d 286. If so, then we have the members of the Federal Home Loan Bank Board, as a pretended sovereign, entering into a contract with themselves, as incorporators. In other words, they give to themselves the right to exist as a body corporate, under the name of the Home Owners' Loan Corporation. Such philosophy is not only dangerous to the social compact, but is absurd. What, for instance, if some act of Congress should impose upon the President the duty of acquiring for the United States for public use the title to privately owned lands located in the State of Virginia, without prescribing a mode of procedure by which such title should be

acquired? Could it be said that the President, in the exercise of the duty thus imposed, could indulge himself in issuing an executive order, or even a proclamation, if you please? Do not the laws of Virginia provide how the title to such lands in that state may be transferred from the owner to another? Did the Congress therefore contemplate, when passing the act, that the President should comply with the laws of the state, within which such lands were located? The answer is yes. Furthermore, if an act of Congress should direct the Secretary of the Navy to move a battleship from one seaport to another, the Secretary, of course, would be expected to send the ship by the usual mode of water travel, rather than to resort to some new and strange scheme of transportation. Again, if Congress should authorize and direct the Secretary of War to purchase uniforms for the Army, without prescribing a mode of procedure, it would be expected that he would execute that duty in the usual mode, namely, negotiate with the owner of the goods, pay the agreed purchase price, obtain a bill of sale, and take delivery thereof. And so, the Congress, in enacting the Home Owners' Loan Act of 1933, contemplated that the Federal Home Loan Bank Board would follow the usual mode prescribed by law, under which public and private corporations are created, unless created by special acts of the legislatures, rather than to experiment in a new concept of democracy, in an effort to create the Home Owners' Loan Corporation. Appellees further say that the Home Owners' Loan Act of 1933 is full and complete in itself; but let us now

examine its language, from beginning to end. By doing so, we find that there is not a single word in that act which authorizes the Home Owners' Loan Corporation, when created, to foreclose real estate mortgages, or to acquire, own, or sell real estate in any part of this country. And the man who sponsored the bill, forming that act, is an appellee here. This situation is, indeed, an unfortunate one.

Appellees, in their brief at pages 9-11, assert the proposition that "the Congress in the enactment of legislation has again and again *recognized* that the Home Owners' Loan Corporation is a validly created and actively existing and functioning government corporation and instrumentality of the United States." But Congress is without power to recognize a nonexistent entity. It is obvious that such alleged Home Owners' Loan Corporation cannot become an "instrumentality of the United States" until it has become a *bona fide* body corporate and politic. Mere words to the effect that it is such an "instrumentality" do not make it so. And the assertion that Congress has, by its several subsequent acts, *recognized* the existence of such corporation, is merely a fallacious theory. For, the Home Owners' Loan Corporation is not even a *de facto* corporation, upon which a congressional recognition may act. In *Commanche County v. Lewis*, 133 U. S. 198, 202, the Supreme Court said:

"It is universally affirmed that when a legislature has full power to create corporation, its act

recognizing as a *de facto* corporation, whether municipal or private, operates to cure all defects in steps leading up to the organization and makes a *de jure* out of what before was only a *de facto* corporation. *It is true that there must be a de facto organization upon which this recognition may act."*

Appellees cite the cases of *Town of Andee v. Ely*, 158 U. S. 312, *Atlantic, etc., R. Co. v. St. Louis*, 66 Mo. 228, *West v. State*, 168 Ala. 1, and *Kotch v. North Ave. R. R. Co.*, 75 Md. 222, in support of their contention as to such legislative recognition. But these cases all deal with *de facto* corporations, hence, not applicable to the case at bar. In *Town of Andees v. Ely, supra*, the court declared that the record shows that articles of association, duly verified, were filed and recorded in the office of the Secretary of State, as required by law, seeking the incorporation of the Delhi and Middleton Railroad Company.

In *Atlantic, etc., R. Co. v. St. Louis, supra*, the court declared that, by act of the legislature of Missouri, approved March 24, 1871, provision was made for the consolidation of the Southern Pacific Railway Company with the Atlantic & Pacific Railroad Company.

In *Kotch et al. v. North American Railway Co., supra*, the Court of Appeals of Maryland declared that the railway company was organized under the General Railroad Law, which provides that the certificate of the incorporators shall specify the names and places of the *termini* of the road—such certificate herein filed.

Hence, the above authorities have no application to the case at bar.

Appellees, in their brief, at page 11 (Point II), again refer to the *wrong* statutes, to-wit, United States Code Annotated, Title 31, Section 231, and Title 18, Section 80, upon which they base their argument. Hence, no response thereto will be made by appellant, except to say that the case of *Olson v. Mellon*, 4 F. Supp. 947, as cited by the appellees, has no application whatever to the case at bar. That case does not involve the taking of money out of the public treasury. It simply raises the question of whether the late Andrew Mellon owed income taxes to the United States.

Appellees, in their brief, at page 13, assert the following:

“In the case at bar, no loss is shown as a result of any alleged false or fraudulent claim or representation. Congress had instructed the United States Treasury to purchase \$200,000,000 worth of stock in the Home Owners' Loan Corporation, thereby manifesting its intention that such sum should be expended. There is no question raised as to whether the Government got what it paid for. The mere fact that money is expended, even if such expenditure was occasioned by a false or fraudulent representation or claim, is not in itself conclusive that a loss occurred to the Government thereby.”

But, it is seen from the language in the Home Owners' Loan Act of 1933, that the Secretary of the Treasury of the United States on behalf of the United States was

directed to subscribe for the capital stock, but not to exceed in the aggregate \$200,000,000, of the Home Owners' Loan Corporation. This means, of course, that no such subscription could be made *until such corporation became a body corporate*, for there would be no capital stock in existence. And the appellees, instead of creating such a corporation by the paper writing set out in the record (R. 4-5), actually represented to the Secretary of the Treasury, on June 14, 1933, that they had really created such corporation, with a capital stock of \$200,000,000, divided into 2,000,000 shares, each having a par value of \$100. So, the United States did not get what it paid for, simply because it paid for nothing and got nothing.

Appellees, in their brief at pages 13, 14, assert:

"It is believed that it sufficiently appears in the case at bar that no pecuniary or property loss occurred. The amended complaint in the present case itself sets out the authority of the Home Owners' Loan Corporation to receive \$200,000,000 from the United States Treasury, and in the absence of any showing that the appellees converted said money to their own use, it is to be presumed that this money was expended for the benefit of the Home Owners' Loan Corporation, whether or not it is a body corporate, and in consequence the United States Government."

But there is an express showing, in twelve parts of the record, that said sum of \$200,000,000, after being placed to the credit account, No. 390980, in the Treasury of

the United States, and known as the Home Owners' Loan Corporation account, was "paid out of the Treasury of the United States to *said defendants*, acting in the name of said pretended Home Owners' Loan Corporation, or to others as they directed."

Appellees, in their brief at page 14, assert:

"The court can judicially notice that the Congress and the United States got what they paid for when the \$200,000,000 was actually expended, and that the Home Owners' Loan Corporation, whether or not a body corporate, relieved distressed home owners in the manner intended by Congress in the Home Owners' Loan Act of 1933."

But this court cannot, as an appellate court, take judicial notice of the alleged matters set out above, for two reasons, first, because they do not appear in the record, and were not brought to the attention of the court below, and, second, because they are wholly immaterial in the case at bar. 1 Jones on Evidence, Section 474, *supra*; *Walton v. Stafford*, 43 N. Y. S. 1049; and *Christy v. Wabash*, 195 Mo. App. 232, 241.

Appellees, in their brief, at page 15, assert:

"If any claim was made it was made for Home Owners' Loan Corporation and if there was not an entity in existence capable of receiving this money then the claim, if it was a claim, was made for appellees as officers of the United States Government and handled and administered by them as such."

But this statement is wholly outside of the issues in the case at bar. The main fact is, that appellees, upon their

several false representations made to the Secretary of the Treasury on June 15, 1933, succeeded in obtaining the sum of \$200,000,000 out of the public treasury, without authority of law. Officers of the United States, who act without authority of law, do not bind the Government. *Pierce v. United States*, 74 U. S. 169. And they are not immune from personal liability to the Government, when sued as individuals by the Government, than are private individuals.

Appellees, in their brief, at page 16, make the following assertion:

“However, so far as the instant case is concerned, it does not make any difference whether a corporate entity exists or not. No allegation is made to the effect that the intent of Congress as expressed in the Home Owners’ Loan Act of 1933, as amended, is not being carried out. What has evolved and is now operating is sufficient for the purposes of Home Owners’ Loan Act of 1933, as amended, regardless of whether any technical incorporation occurred.”

All of the foregoing statements are extraneous to the facts set forth in the appellant’s amended complaint, including the so-called charter of the Home Owners’ Loan Corporation.

Appellees, in their brief, at pages 16-17, assert:

“So far as the good faith of appellees is concerned, as early as August 22, 1933, the Attorney General of the United States had rendered an opinion that the Home Owners’ Loan Corporation was

validly organized (37 Op. Atty. Gen. 241) and in so ruling had referred to 'the charter of Home Owners' Loan Corporation, as adopted by the Federal Home Loan Bank Board on June 14, 1933.' "

But the opinion of the Attorney General, while it deserves some consideration, was not a judicial adjudication. This opinion, in the form of a letter to the President of the United States, was written by an attorney from Salt Lake City, Utah, whose legal experience was limited to the practice of law in the State of Utah, and who had come to the Department of Justice in 1933. There is no particular magic in such an opinion even if it bears the signature of the Attorney General of the United States.

Conclusion.

It is respectfully submitted that the action of the trial court in sustaining the motion to dismiss the amended complaint, and in entering judgment in favor of the appellees and against appellant, should be reversed.

Respectfully submitted,

United States of America, Acting
on the Relation of Edmond C.
Fletcher, and the said Edmond
C. Fletcher, Individually,
By EDMOND C. FLETCHER, *Pro se*,
Appellant.

